

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For the Period
From October 1, 1963
Through December 31, 1963

VOLUME 113

RICHMOND M. FLOWERS, Attorney General



T. O. "Tillie" Walker

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

From October 1, 1963
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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1963 through December 31, 1963, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

RICHMOND M. FLOWERS

Attorney General

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OPINIONS

October 3, 1963

Hon. Guy D. Roberts
Chairman
Board of Revenue and Control
Morgan County
Decatur, Alabama

Elections — Voting Districts — Wards — Precincts.

1. Under the provisions of Section 90(4) of Title 17, Code of Alabama, Recompiled 1958, the county governing body may change the confines of voting places, election precincts, districts or wards, if the change is made for a reason other than such territory contains more than the requisite number of voters at any time, except three months prior to an election.

2. Under the provisions of Act No. 190, Special Session of the Legislature 1961, amending Sections 77 and 80 of Title 17, Code of Alabama, Recompiled 1958, the county governing body shall at its first meeting in March, 1962 and every two years thereafter, where more than the requisite number of qualified electors reside within the confines of voting territory, subdivide such territory in one of the ways provided in said Act No. 190.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 16, 1963, is as follows:

"The Board of Revenue and Control of Morgan County, Alabama, has voted to purchase voting machines for use in the City of Decatur and the City of Hartselle. The remainder of the County will use paper ballots. This necessitates changing the boundaries of certain precincts and election districts and the renumbering thereof. The tax collector will begin collecting poll taxes on October 1, 1963, and wishes to use the new voting place designations on his receipts if possible.

"Your official opinion is respectfully requested as to whether the boundary and numbering changes may be made at this time or must be made at the first meeting in March of 1964 in view of the provisions of Title 17 Sections 77 and 88 Code of Alabama Recompiled 1958 as amended by Act No. 190, Acts Alabama, Special

Session 1961, and other applicable provisions of law. If we must wait until the first meeting in March of 1964, will that not conflict with Title 17 Section 90(4) Code of Alabama, Recompiled 1958."

In answer to your request, you are advised that under the provisions of Section 90(4) of Title 17, Code of Alabama, Recompiled 1958, the Court of County Commissioners may at any time, except three months prior to an election, change the confine and territorial boundaries of voting places, election precincts, districts or wards in the manner hereinafter set forth.

Your attention is directed to the fact that Act No. 190, Special Session 1961, which amends Sections 77 and 80 of Title 17, Code of Alabama 1940, does not require county governing bodies to change the boundaries of precincts at its first regular meeting in March, 1962, and every two years thereafter, but is dealing only with subdividing precincts in which there are more than three hundred qualified voters where paper ballots are used and six hundred qualified voters where voting machines are used into election districts, or where such situations exist, to regroup the alphabetical grouping of voters, and furnishing additional ballot boxes or voting machines.

It would appear at first blush that Section 90(4) of Title 17, Code of Alabama 1940, is in direct conflict with Act No. 190, *supra*. However, upon an analysis of Section 90(4), *supra*, it is to be noted that this section is primarily concerned with **places of voting** that have been designated, and then provides that election precincts, districts, wards, or voting places shall not thereafter be changed within three months before an election is to be held. This section is dealing with changes of voting places generally, and is not based on the fact that any given voting place has more than three hundred qualified voters or more than six hundred qualified voters therein as the case may be. In other words, Section 90(4) has to do with changing of voting places for a reason other than the fact that the voting places contain more than three hundred qualified voters where paper ballots are used and six hundred qualified voters where voting machines are used. If the county governing body desires to change a voting place for any reason, maybe for convenience or for some other reason, and the change of such voting place, or the change of the election precinct, district, or ward, is done for a reason other than the precinct, ward, district or voting place contains more than three hundred qualified voters or more than six hundred qualified voters, as the case may be, then in that event a change may not be made within three months prior to an election.

The provisions of Act No. 190, *supra*, is bottomed solely on the fact that if election precincts contain more than three hundred qualified voters where paper ballots are used or more than six hundred qualified voters where voting machines are used, then the county governing body, if this fact exists, at its first regular meeting in March, 1962,

and every two years thereafter, shall subdivide the election precincts or furnish additional ballot boxes or voting machines to the existing voting places.

It is a well known rule of statutory construction that, if possible, two statutes which apparently are in conflict, must both be given a field of operation.

In my judgment, it is possible to give a field of operation to both Act No. 190 and Section 90(4) of Title 17, without doing violence to either. The fields of operation are as follows:

If the county governing body desires to change the confines of the voting place, election precinct, district or ward, for a reason other than such territory contains more than three hundred qualified voters where paper ballots are used or more than six hundred qualified voters where voting machines are used, it must follow the provisions of Section 90(4) of Title 17, and such change may not be made within three months prior to the election.

The field of operation of Act No. 190 is, if at its first meeting in March, 1962, the county governing body finds that a precinct contains more than three hundred qualified voters where paper ballots are used and more than six hundred qualified voters where voting machines are used, then the provisions of Act No. 190 must be followed, and the precinct shall be subdivided in one of the ways as provided in said act at the first meeting of the county governing body in March, 1962, and every two years thereafter.

It appears from your request that the Board of Revenue of your county desires to change the confines of such voting territories not for the reason that they have more than the requisite number of qualified electors residing therein, but for the reason that your county is installing voting machines in certain precincts and for the purpose of convenience the change is necessary. You are, therefore, advised that your county governing body may at this time or any other time except three months before an election, under the provisions of Section 90(4) of Title 17, Code of Alabama, Recompiled 1958, change the confines of certain voting territory in your county.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 3, 1963

Mr. W. W. Rabren, County Solicitor
Shelby County Law and Equity Court
Columbiana, Alabama

Infants — Bastardy — Appeals — Evidence.

In cases under the provisions of Title 27 Section 12 (1) to (9) Code of Alabama 1940, as amended, where the reputed father fails to make application for blood tests upon the trial of the case in an Inferior Court and is adjudged to be the father of the child in said trial and then appeals the case to the Circuit Court for a trial de novo, the defendant is entitled to an order for the blood tests upon application made by him in the Circuit Court.

Opinion by Assistant Attorney General Stapp.

Dear Mr. Rabren:

Your request for an official opinion is as follows:

In cases under the provisions of Title 27 Section 12 (1) to (9) Code of Alabama 1940, as amended, where the reputed father fails to make application for blood tests upon the trial of the case in an Inferior Court and is adjudged to be the father of the child in said trial and then appeals the case to the Circuit Court for a trial de novo, is the defendant entitled to an order for the blood tests upon application made by him in the Circuit Court?

It is my opinion that this question should be answered in the affirmative. Section 5 of Act #295 Ex. Sess. 1961 (Tit. 27, Sec. 12 (5) Code of Alabama Recompiled, 1961 Cumulative Pocket Part) provides as follows:

"Blood tests on reputed father's application; admissibility in evidence.

—In any illegitimacy case the court, upon application made by the reputed father whose blood is involved, shall order the mother, child and reputed father to submit to one or more blood tests to determine whether or not the accused can be excluded as the father of the child. No such blood test of any child shall be taken before the child reaches the age of six months. Whenever the court orders any such blood test to be taken, the mother shall refuse to submit either herself or the child to the test, such fact shall be disclosed upon the trial unless good cause is shown for not doing so. Any tests shall be made by an expert qualified as an examiner of blood types, and he shall be appointed by the court. The court shall fix the compensation of any expert at a reasonable amount, and may

direct the same to be paid by the county or any other party to the case or by both, in such proportions and at such times as the court shall prescribe. Prior to the making of said test, the court may order any part or all of the said compensation paid in advance. The result of the tests shall be receivable in evidence in the trial of the case, but only in cases where definite exclusion is established. If more than one expert is appointed by the court, and if they disagree in their findings or conclusions, neither the findings, conclusions, or results of these tests shall be admissible as evidence of the paternity or non-paternity of the reputed father."

This section is followed by Section 6 of Act #295, *supra*. That section provides:

"Appeal to circuit court. The state of Alabama or the reputed father may appeal from any final judgment rendered under section 12(4) of this title by the court in which the proceeding originated within ten days after rendition thereof by filing written notice of such appeal within said prescribed period with the clerk of the circuit court to which said appeal is taken and in the court rendering the judgment. On such appeal the trial shall be *de novo*. The state or the reputed father shall have the right to demand a trial by jury for said trial *de novo* by filing a written demand therefor with the clerk of the circuit court within ten days after the appeal is taken, but the only question of fact for the decision of the jury shall be the paternity of the child. All other questions of fact in the trial *de novo* shall be decided by the court without the intervention of a jury."

You will notice in Section 6 of Act #295, *supra*, that "on such appeal the trial shall be *de novo*" (emphasis supplied). Black's Law Dictionary (4th edition, 1951) defines the word *de novo* as meaning: Anew; afresh; a second time. In *Archer v. High*, 193 Miss. 361, 9 So.2d 647, 648, the Mississippi court discussing the meaning of *de novo* stated:

"All appeals from a justice of the peace are heard *de novo*, which means that such appeals "are to be tried anew, as if never tried before." *Callahan v. Newell*, 61 Miss. 437; *Amory Independent Telephone Co. v. Cox*, 103 Miss. 541, 60 So. 641; Code 1930, §67.

Consistent with this view, it is not necessary for us to refer defendant's right to require such security to Section 682, but the rights of both parties are the same as if the suit had been originally brought in the circuit court."

Following this reasoning, it appears that the legislature intended to give the defendant all of the rights in the Circuit Court that he would be entitled to in the court from which he appealed.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 4, 1963

Honorable Vaughan H. Robison, Attorney
Board of Education of Montgomery County
36 South Perry Street
Montgomery 4, Alabama

Schools — Counties — Montgomery County — Funds

The County Board of Education of Montgomery County may appropriate funds to the extent of value received for the purpose of contributing to the construction of a water distribution system, and connections thereto, which would serve certain school facilities under its jurisdiction, if it determines the same to be necessary and for the best interest of the schools concerned; and turn said monies over to the water company involved. This is applicable to monies appropriated for these purposes by the County Board of Revenue to the County Board of Education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of September 26, 1963 is as follows:

"The Board of Education of Montgomery County, Alabama, is desirous of having your office render an opinion on the following matter:

"Ramer Water Company, Inc., a non-profit corporation organized and existing under and by virtue of the laws of the State of Alabama proposes to construct a water distribution system in Ramer, Alabama and the surrounding area.

"The Board of Education of Montgomery County, Alabama, has two schools, the Montgomery County High School and the Dunbar High School, in the area proposed to be served by the water distribution system to be constructed by Ramer Water Company, Inc. Also the Montgomery County Board of Education has a Ramer Teachers Home which would be served by the said water distribution system.

"At the present time wells are being used to supply the Montgomery County High School, the Dunbar High School and the Ramer Teachers Home and these wells are not satisfactory and do go dry at certain periods during the year and the schools are without water.

"The Board of Education of Montgomery County, Alabama, desires to pay to the Ramer Water Company, Inc., \$7,500.00 toward the expense of the construction of the water distribution system and an additional sum of \$250.00 to connect to the said system for the said three sites.

"After the system is constructed and becomes operative there will be monthly charges made by Ramer Water Company, Inc., to the Board of Education at rates approved by the proper authorities for the water used at the Montgomery County High School, the Dunbar High School and the Ramer Teachers Home.

"The Board of Revenue of Montgomery County, Alabama, proposes to appropriate the sum of \$7,500.00 for the specific purpose of assisting in the cost of construction of the said water distribution system. This said sum of \$7,500.00 to be appropriated by the Board of Revenue of Montgomery County, Alabama, will be used in construction of the said water distribution system which will supply the said school sites. The Board of Revenue of Montgomery County, Alabama further proposes to pay the said sum of \$7,500.00, so appropriated, to the Board of Education of Montgomery County, Alabama, for payment by the Board of Education of Montgomery County, Alabama, to the Ramer Water Company, Inc.

"The specific questions submitted to your office for an official ruling are:

"1. May the Board of Education of Montgomery County, Alabama, by and under authority of Act No. 222, 1939 Local Acts of Alabama, Page 125, pay the said sum of \$7,500.00 to Ramer Water Company, Inc., a non-profit corporation organized and existing under and by virtue of the laws of the State of Alabama toward the construction cost of a water distribution system to be the property of the said corporation and which said water distribution system will supply water to the Montgomery County High School, the Dunbar High School and the Ramer Teachers Home?

"2. May the said Board of Education of Montgomery County, Alabama, by and under the authority of said Act No. 222, pay to the said Ramer Water Company, Inc., the said additional sum of \$250.00 for water connections to the said school property?

"3. May the Board of Education of Montgomery County, Alabama, by and under the authority of Act No. 222, 1939 Local Acts of Alabama, Page 125, pay the said sum of \$7,500.00 to be appropriated by the Board of Revenue of Montgomery County, Alabama directly to the Ramer Water Company, Inc., a non-profit corporation organized and existing under and by virtue of the laws of the State of Alabama toward the construction cost of the said water

distribution system which said system will supply water to the said school sites?

"4. In the event your answer to any one of the above numbered questions is in the negative, please direct us how the Board of Education of Montgomery County may pay said sums toward the construction cost of said water system; and further how the said Board of Education may pay the said sum of \$250.00 for water connections to the said sites."

I am of the opinion that your first, second, and third inquiries should be answered in the affirmative, subject to limitations hereinafter set forth.

Act No. 222, Local Acts of Alabama 1939, page 125, established the County Board of Education in and for Montgomery County. All rights, privileges, authority, and powers now and heretofore vested by law in any city or county board of education within said county were transferred to this County Board of Education.

Title 52, Section 207, Code of Alabama Recompiled 1958, as amended by Acts 1959, Second Extra Session, page 196 (1961 Cumulative Pocket Part) provides as follows:

"§ 207. Appropriation of funds out of county treasury.—The courts of county commissioners or boards of revenue of the several counties of Alabama are authorized at any meeting of said court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the county treasury for the construction, repair, operation, maintenance and support of new or existing public schools within said county."

County boards of education have authority to contribute to the cost of such a water distribution system to the extent of said project's worth and value to the public school facilities affected thereby. Said boards have considerable latitude in determining what is necessary and for the best interest of the schools under their jurisdiction. It is my opinion that, in the absence of an abuse of discretion, if the County Board of Education of Montgomery County determines it is necessary and for the best interest of the schools concerned to make the expenditures under consideration, it may legally do so to the extent of value received. This office has on enumerable occasions ruled to the above effect.—See Quarterly Report of Attorney General, volume 14, page 19; Volume 18, page 196; Volume 19, page 229; Volume 53, page 142; Volume 70, page 70; Volume 98, page 14. See also letters of Attorney General to: Honorable A. Y. Sibley, Superintendent of Education, Colbert County, dated October 19, 1956; Honorable Ralph L. Jones, Attorney for Monroe County Board of Education, dated July 13, 1959; Honorable B. C. Botts,

Superintendent, Pike County Schools, dated November 3, 1959; Honorable George H. Roberts, Superintendent, Limestone County Board of Education, dated October 17, 1961.

In view of the foregoing, it is my opinion that the County Board of Education of Montgomery County may appropriate funds for the specific purposes stated in your inquiry subject to conditions above set out; and turn the same over to Ramer Water Company, Inc. to be applied toward the costs of construction of the water distribution system, and the connections thereto, which would serve three sites in question. This also applies to the monies appropriated by the County Board of Revenue of Montgomery County to the County Board of Education of said county for the purposes under consideration.—See Quarterly Report of Attorney General, Volume 110, page 90.

It is, of course, assumed that the Ramer Water Company, Inc. will agree to supply the water to the school facilities in question.

The answer to your first three inquiries obviates answering your fourth inquiry.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 7, 1963

Mrs. Agnes Baggett
Secretary of State

C A P I T O L

Attorney General — Service of Process — Secretary of State —
Superintendent of Insurance.

1. Where request for official opinion of Attorney General disclosed that requesting public official already had acted in the premises; where the event giving rise to the request was unlikely to re-occur in the near future; where requesting public official had received informal oral advice from an assistant attorney general in regard to the subject of the request; and where the point presented by the request was available, and likely to be raised, in pending private litigation, Attorney General would defer delivery of formal written opinion until termination of private suit.

2. The functions of public officials who are designated by statute as agents for service of process upon non-resident en-

tities do not encompass a determination of whether such agency exists.

3. The Unqualified Insurers Process Act (Tit. 28, §§ 412-417, **Ala. Code 1940**, as recompiled) does not provide the exclusive mode for effecting substituted service upon non-qualifying foreign insurance companies.

4. The defense of insufficient service of process generally is personal to the entity insufficiently served.

5. Neither the Secretary of State nor the Superintendent of Insurance should decline to receive and forward proffered process in suits against foreign insurers. Tit. 7, § 199 (1), Tit. 28, §§ 412-417, **Ala. Code 1940**, as recompiled.

Opinion by the Deputy Attorney General.

Dear Mrs. Baggett:

I have your letter the text of which reads as follows:

"Please give me your official opinion on the following:

"William N. Ary was insured with a liability insurance policy with the Lakeshore Mutual Insurance Company, a corporation, 4720 N. Sheridan Road, Chicago 40, Ill., sometime prior to July 29, 1962, and issued a liability policy including medical payments for guests riding in the insured automobile. This policy was in full force and effect on July 29, 1962, at which time Mr. and Mrs. Bervel Cooper were injured while riding as guests in the automobile, and were entitled to compensation under the medical payments of the liability policy issued to Mr. Ary. At no time did the insurance company do business prior to the accident and the only business they have done since that time was to adjust the loss under the insurance policy for the medical payments of Mr. & Mrs. Ary, investigate the accident, and make several contacts with Mr. & Mrs. Cooper and another injured party who was riding in the automobile. "Honorable Walter B. Henley, Attorney at Law, Northport, Alabama, the attorney for the plaintiffs, believes that there is no authority allowing service on this type of case on the Superintendent of Insurance and that the only way that they can be served is under the provisions of Title 7, Section 199 (1) of the 1940 Code of Alabama.

"In the past, as you know, we have not accepted any service on an insurance company, whether it was qualified to do busi-

ness in the State or not. These papers have been turned over to the Insurance Department.

"Your assistance in clarifying this point will be greatly appreciated."

Upon first reading, your letter disclosed that you already had acted in the premises and desired clarification of points of law for future guidance. I collaterally was advised that the incident giving rise to your inquiry was not likely to re-occur in the immediate future. Your above-quoted letter itself revealed that the point in question was available, and likely to be raised, in then pending private litigation. The quoted letter was transmitted under cover of a letter indicating that you had been advised informally and orally by an assistant attorney general as to the subject of your inquiry. I consequently have deferred formal written response to your inquiry until termination of the mentioned litigation, lest my opinion unnecessarily influence the course of that litigation. I am advised that the suit in question has now been concluded. It therefore appears that formal written response to your inquiry is now in order, with, however, one initial limitation and caveat: In nothing that I say in the course of this opinion am I, in my official capacity, to be regarded as adopting any of the several legal conclusions¹ either expressed or implied in your request. It may be that each of these conclusions—save, possibly, the last of those mentioned by way of example in the appended footnote, cf. **Franklin Life Ins. Co. v. Ward**, 237 Ala. 474, 187 So. 462 (1939)—is correct. It may be that none of them is correct. Determination of such points is not deemed necessary to a proper response to your inquiry; and, if it were, I would need to know more facts than appear to have been laid before either of us in our respective official capacities.

I am advised that the insurance company which you mention in your letter has never qualified to do business in Alabama. Consequently, if it is amenable to service of state process in Alabama in an action for policy proceeds, or in any other in personam action, it must be so by virtue of certain "minimum contacts" (**International Shoe Co. v. Washington**, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 [1945]; **New York Times Co. v. Sullivan**, 273 Ala. 656, 144 So. 2d 25 [1962], cert. granted, 371 U.S. 946, 83 S. Ct. 510, 9 L. Ed. 2d 496[1963]) which it—acting, as corporations necessarily must, through natural persons—has had with the state of Alabama. Both the Code section which you mention, namely, Tit. 7 § 199 (1), and the Unauthorized Insurers Process Act, Tit. 28, §§ 412-417, necessarily assume that such contacts have been

¹E.g., that the policy referred to in your request was "in full force and effect on July 29, 1962 . . ."; or that Mr. and Mrs. Cooper were "riding as guests in the automobile" to which you refer at the time to which you refer; or that the settlement of certain claims and the investigation and attempted adjustment of other claims constituted the "doing of business" within this state by the insurer to whom you refer.

had. Each of the cited statutes contains an enumeration—albeit, in the case of Tit. 7, § 199 (1) in somewhat general language—of certain activities which, if carried on within the state of Alabama, shall be deemed equivalent to appointment of a specified public official as an agent for service of process upon a non-resident entity conducting such activities within the state. Each of the statutes thus proceeds on a theory of implied consent to the creation of an agency relationship for service-of-process purposes. The law designates these agents without reference to any actual consent on the part of the principals. Under Tit. 7, § 199 (1) the designated agent for such service of process is the Secretary of State. Under Tit. 28, §413 the designated agent is the Superintendent of Insurance.

As suggested above, the language of Tit. 7, § 199 (1) is quite broad. It would predicate a presumptive agency of the doing of “any business or [the] perform[ing] of any character of work or service in this state —[by non-resident entities, including non-qualifying foreign corporations]” Such agency would exist for service-of-process purposes “in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service, or relating to or as an incident thereof, by any such non-resident, or his, its or their agent, servant or employee. And [, according to the statute,] such service shall be valid whether or not the acts done in Alabama shall of and within themselves constitute a complete course of action.”

Apart from its extending to “acts . . . effected by mail . . . ,” the catalogue of conduct which is set out in the Unauthorized Insurers Process Act, Tit. 28, §§ 412-417, as legal bases for a presumed agency for service of process is more restricted than its counterpart in Tit. 7, § 199 (1). At the very least, the acts done must be done in the “transaction of insurance business.” It further would appear that the fictional agency contemplated in Tit. 28, §§ 412-417, exists only for purposes of service of process in actions, or other proceedings, brought by or on behalf of an insured or beneficiary and “arising out of . . . [a] contract of insurance.”

It thus would appear that there **may** be situations in which, under the literal language of the respective statutory sections involved, a foreign insurer would not be amenable to service of process under Tit. 28, §§ 413-417, and yet be amenable to such service under Tit. 7, § 199 (1). Nothing in the Unauthorized Insurers Process Act suggests that it was designed to afford the exclusive means of perfecting service of process upon non-qualifying foreign insurance companies. To the contrary, the final sentence of the presently pertinent section of the statute expressly provides that:

“Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.”

Tit. 28, §413 (e).

Even in the absence of any such express disclaimer of legislative intent to provide the only means of perfecting service of process upon a foreign corporation, the courts might well treat statutes of the type here involved as being cumulative and complementary. See **Eagle Life Assn. v. Redden**, 121 Ala. 346, 25 So. 779 (1899). Such a holding is all the more likely in the face of a legislative declaration of the type appearing in Tit. 28, § 413 (e), quoted above. **Gargac v. Smith-Rowland Co.**, 170 F. 2d 177 (7 Cir. 1948).

Moreover, the functions of public officials who are made agents for service of process under statutes of the type here involved are ministerial in character and do not encompass a determination, by the agent, of whether the non-resident entity sought to be sued has had such contacts with the state as to authorize service of process upon the agent in question. Such determination is to be made by the courts, and not by the official upon whom service is attempted. **New York Times Co. v. Sullivan**, 273 Ala. 656 at 670, 144 So. 2d 25 (1962), cert. granted, 371 U.S. 946, 83 S. Ct. 510, 9 L. Ed. 2d 496 (1963). It even has been intimated that where a statute provides for the designation of a particular public official as an agent for service of process in suits against non-resident entities, such official has virtually no choice but to accept attempted service of process upon him as such agent. If certain statutorily specified events have occurred, he has become the foreign entity's agent. If those events have not occurred, he has not become such agent. I.e., he either has the power to bind the non-resident by receiving the process, or he does not have the power. If he has the power, his refusal to accept service is inefficacious. c.f. **Knapp, Stout & Co. v. National Mut. Ins. Co.**, 30 F. 607 (C.C.E.D. Mo. 1887). If he does not have the power—i.e., if no agency in him has arisen by virtue of the occurrence of the statutorily prescribed events—it is up to the courts, and not to the public official in question, to hold that service ineffective to confer jurisdiction over the entity sought to be sued. The defense of insufficient service of process ordinarily and generally is personal to the particular defendant insufficiently served. **Everett v. Miller**, (Munic. Ct. Apps. D. C. 1949) 67 A. 2d 399 **Threw v. Standard Supply & Hardware Co.**, (La. App. 1947) 33 So. 2d 426; cf. **King v. Gibbs**, 12 Ala. App. 504, 67 So. 757 (1914). Whether such entity elects to challenge, to acquiesce in, or to ignore the purported service—the last of which it would do at its peril—the consequences of its choice are the concern of that entity and not the concern of its assumed agent for such service of process.

In short, a public official who is designated—whether by statute or by formal instrument of consent executed by the non-resident entity—as agent for service of process upon a non-resident entity should accept the service and then, upon giving the required notice, let the non-resident defendant decide whether to deny the existence of the agency necessary to the efficacy of such supposed service.

On the basis of the foregoing considerations, I am of the opinion that neither the Secretary of State nor the Superintendent of Insurance should decline to receive and forward proffered process in suits against foreign insurers. If the insurer has qualified to do business in this state, proper service upon the Superintendent of Insurance will be sufficient once a copy of the process or notice is forwarded to the insurer sought to be sued. Tit. 28, § 65, **Ala. Code 1940**, as recompiled. If the foreign insurer has not qualified to do business in this state, service upon the Superintendent of Insurance, followed by his prompt forwarding of a copy of the process by registered mail to the foreign insurer at its last known principal place of business, will be sufficient **if the non-qualifying foreign insurer has done any of the acts enumerated in Tit. 28, § 413 (a)**, in this state. If the non-qualifying foreign insurer has **not** done any of the acts enumerated in Tit. 28, § 413 (a) in this state, but **has** had contact of the sort listed in Tit. 7, § 199 (1) with this state, then service upon the Superintendent of Insurance would not be sufficient as against the insurer, **should it elect to raise such defense**; but service upon the Secretary of State might be sufficient as against the insurer. In no event, however, should the public official who is sought to be served undertake to determine whether service upon him is sufficient. That is a matter for the court ultimately to decide, after the non-resident defendant itself has decided whether to raise the point.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 8, 1963

Honorable Joe L. Payne
Attorney, City Board of Education
102 South Side Square
Huntsville, Alabama

Schools — Infants.

1. A child whose birthday anniversary is October 2, 1963 attains a given age on October 1, 1963 and if six years old is entitled to attend the public elementary schools at the opening of schools in 1963, or as soon thereafter as practicable.
2. In Alabama, under the common law, and in the absence of statute governing the matter, one's age is computed by including the day of birth so that a given age is attained the day before his birthday anniversary.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request on behalf of the City Board of Education of Huntsville for an official opinion, bearing date of October 2, 1963, is as follows:

"The City Board of Education of Huntsville, Alabama, desires your opinion to the following question:

"'Is a child whose sixth anniversary of his birth is on October 2 entitled to admission to the public elementary schools at the opening of such schools for that school year ' "

"This question is propounded to you because there has been a parent who has raised this question with our local board. The City Superintendent of Schools and I interpreted Title 52, Section 298, to mean that the child must have reached his or her sixth birthday on or before October 1 to be entitled to admission, and that a child whose birthday was on October 2 was not entitled, it appearing to us that this was the intention of the legislature.

"There is attached a letter from the law firm of Bell, Morring, Richardson, and Cleary, who are representing said parent, in which there are some citations on this subject.

"As noted in this letter, I am sure that the parent would appreciate your prompt attention to this matter, as we have not admitted this child to our public school system at this time."

In pertinent part, Section 298, Title 52, Code of Alabama 1940, provides that a child who is six years of age **on or before** October first shall be entitled to admission to the public elementary schools at the opening of such schools for that school year or as soon as practicable thereafter.

So the question presented is whether or not under the facts stated the child in question was six years of age on October 1, 1963.

My answer to that is in the affirmative, and the child was entitled to attend the public elementary schools at the opening of such schools for this year, 1963, or as soon thereafter as practicable.

Where the common law prevails, the general rule for the computation of time is to exclude the first and include the last day, but for over two hundred years the common law has recognized a remarkable exception to this rule to the effect that in computing a person's age,

the day on which the person was born is included, and he therefore reaches his next year in age at the first moment of the day prior to the anniversary date of his birth.

The above exception has become so well established over a long period of time that it has attained an independent status of its own. **Nelson v. Sandkamp**, 227 Minn. 177, 34 N.W. 2d 640, 5 A.L.R. 2d 1136. **Taylor v. Aetna Life Ins. Co.**, 49 F.Supp. 990 (Tex.); **Ostmann v. Ostmann**, 237 Mo.App. 223, 169 S.W.2d 81; 86 C.J.S., Time, page 831.

The general rule is stated to be that where the common law prevails, one's age is computed by including the day of birth so that a given age is attained the day before his birthday anniversary, no other method being prescribed by statute. 5 A.L.R. 2d at page 1147, and the cases cited therein.

There are no controlling statutory provisions in Alabama, and the present question is answered by the above common law rule, which is in effect in Alabama.

The Supreme Court opinion reported in **Frost v. State**, 153 Ala. 654, 45 So. 203, and one by this office in Quarterly Report of Attorney General, Volume 18, page 31, are persuasive as to the correctness of the conclusion here reached.

In the opinion reported in Volume 18, *supra*, it was ruled that a person for the purpose of registration as a voter becomes of full age on the day preceding the twenty-first anniversary of his birth, the common law rule prevailing.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 9, 1963

Honorable Riley P. Green, Jr.

Circuit Solicitor

Twelfth Judicial Circuit of Alabama

Troy, Alabama

Corporations — Constitutional Amendments.

A foreign corporation complying with Constitutional Amendment CLIV may take a voluntary conveyance from

defaulting mortgagors without subjecting itself to prosecution under Sections 90-96 of Act No. 414, General and Local Acts 1959, page 1011.

Opinion by Assistant Attorney General Bridges.

Dear Sir:

Your request for an official opinion bearing date of August 26, 1963 is, in substance, as follows:

May a foreign corporation complying with the provisions of Amendment CLIV of the Constitution of Alabama 1901 take a voluntary conveyance from defaulting mortgagors without becoming subject to prosecution under the provisions of Title 10, Sections 21(90)-21(96), Code of Alabama 1940, Recompiled 1958.

It is my opinion that a foreign corporation operating under the provisions of Amendment CLIV of the Constitution of Alabama 1901 may accept a voluntary conveyance from defaulting mortgagors without being subject to prosecution.

Amendment CLIV, *supra*, was ratified by the electorate of this state on November 8, 1960 and is in pertinent part as follows:

"Section 1. Any corporation which is not organized under the laws of this state and has no place of business in this state may take and hold mortgages on real property located within this state, deposit the proceeds thereof in a bank account, or bank accounts, in this state, collect the debts secured thereby and may appoint a custodian or collection agent, who must be duly licensed under the laws of this state, to engage in the business of mortgage loan broker, to hold for such non-resident such securities, collect such debts, manage any property acquired by foreclosure thereof, sell and dispose of any property acquired by foreclosure thereof and enforce the provisions of such mortgages and no such foreign corporation shall be deemed to be doing business in this state solely by reason of doing any or all of the acts designated herein; . . .

"Section 2. No foreign corporation, which does no other acts in this state than those provided in section 1 hereof, shall be required to pay any franchise tax, qualification fee, permit fee, nor shall it be required in any other way to qualify to do business in this state . . ."

Act No. 414, General and Local Acts 1959, page 1101, is found in the 1961 Cumulative Pocket Part to the Code of Alabama 1940, Recompiled 1958 as Title 10, Sections 21(1)-21(99) Sections 90-96 of Act No.

414 are designated in the said Pocket Part as Title 10, Sections 21(90)-21(96). These sections were cited by you in your request.

Section 90, *supra*, provides that before doing business in this state every foreign corporation must qualify as such by filing certain instruments and documents and paying certain fees. Section 91, *supra*, designates where the instruments and documents are to be filed and establishes the fees to be paid. Section 92, *supra*, states that it is unlawful for a foreign corporation to do business as such in this state without first complying with the provisions of Sections 90 and 91, *supra*, and sets the penalty therefor. Section 93, *supra*, declares that it is unlawful to act as an agent in this state for a foreign corporation unless the corporation has complied with Sections 90 and 91, *supra*, and establishes the penalty therefor. Section 94, *supra*, provides certain penalties for a foreign corporation, its agents, servants and officers making or attempting to make any contract, agreement, undertaking or engagement when the said corporation does not have a license to do business in this state. Section 95, *supra*, imposes upon circuit and county solicitors the duty of collecting and enforcing the penalties enumerated in Sections 92, 93, and 94. Section 96, *supra*, provides for certain exemptions from the preceding five sections. These exemptions are not here pertinent.

Amendment CLIV specifically permits a foreign corporation to do the following acts without requiring such corporations to comply with Sections 90 and 91 of Act No. 414, *supra*: (1) take and hold mortgages on real property located within this state; (2) deposit proceeds thereof in a bank account, or bank accounts, in this state; (3) collect the debts secured thereby; and (4) appoint a custodian or collection agent who among other things is to manage any property acquired by foreclosures, sell and dispose of such property and enforce the provisions of mortgages held by such foreign corporation.

Did the legislature and the electorate of this state intend to grant to a foreign corporation, complying with the provisions of this constitutional amendment, the authority to take a voluntary conveyance from a defaulting mortgagor? I believe that such was the intent.

That which is clearly implied from the express terms of a constitutional provision is as much a part thereof and is as effectual as that which is expressed. **Ex parte Southern Bell Tel. & Tel. Co.**, 267 Ala. 139, 99 So. 2d 118.

The constitutional provision in question clearly contemplates that corporations operating thereunder are authorized to foreclose property mortgaged to such corporations. It follows as logical and reasonable

that such corporations are also empowered to take a voluntary conveyance from defaulting mortgagors.

Very truly yours,

RICHMOND M. FLOWERS

Attorney General

October 10, 1963

Hon. Otis R. Burton
Tax Collector
Talladega County
Talladega, Alabama

Taxation — Ad Valorem Taxes — Corporations.

Individual shareholders of stock in domestic corporations are liable for ad valorem taxes assessed against the shares of the corporation to the extent of their ownership, where the corporation is insolvent or otherwise unable to pay the tax assessed.

Opinion by Assistant Attorney General Payne.

Dear Sir:

This will acknowledge your request for an official opinion of this office which is as follows:

"I will appreciate very much if you will give me an official opinion on the following question.

"(1) In the event of an assessment of a local Corporation for ad valorem taxes becomes delinquent or claims to be insolvent, claiming their assessment was in total error, and the corporation was without funds, insolvent, and unable to pay assessment.

"(2) They do not own any property of record, real or personal.

"(3) The basic question is, whether I should proceed to collect this corporation tax, from the individual shareholders, which are not named in the corporation assessment.

"(4) Are the shareholders personally liable for this tax?

"Thank you for your attention."

Since receipt of your letter as shown above, I have talked with you over the telephone at which time you advise that the tax in question involved ad valorem taxation of shares of stock of a domestic corporation organized and incorporated in Talladega County with its principal office in Sylacauga.

I can best answer your questions by stating a few principles relative to the assessment of shares of stock of domestic corporations for ad valorem tax purposes in Alabama. The assessment of the shares of stock is authorized by Section 25 of Title 51, Code of Alabama 1940, Recompiled 1958. The assessment of the shares of stock is against the individual shareholder and not against the corporation. Section 25, supra. **State v. Southeastern Metals Co.**, 254 Ala. 631, 49 So. 2d 182. However, the corporation may become liable for the assessment in the following manner: When the State Department of Revenue makes a tentative or preliminary assessment of the shares and gives the corporation notice thereof, in which notice it is stated that the assessment will become final on a specific date unless cause be shown at the appointed time why it should not be done. At that time the corporation may appear and show that it has not agreed to pay the tax on its shares, or for any other reason, why the assessment should not be made final against the corporation. If the corporation does not appear before the Department and make such a showing or claim, such failure to act amounts to an admission of liability for the amount of the tax based on the assessment. In other words, by failing to contest the assessment a liability accrues against the corporation for its implied consent to pay the assessment. **Fuqua v. Spry Burial Ins. Co.**, 254 Ala. 189, 47 So. 2d 817. In addition, the corporation may become liable to pay the tax by endorsement on its assessment of its agreement to pay the taxes; when this is done the corporation is not required to file a list of its shareholders. Section 28, Title 51, supra. The fact that the assessment of the tax appears on the books of the tax assessor in the name of the corporation affords no ground of objection to the shareholder as to the validity of same. Section 25, supra; **Fuqua v. Spry Burial Ins. Co.**, supra.

In the assessment of shares of stock as noted herein, both the individual shareholder and the corporation may be liable for the tax. This liability is evidenced by the provisions of Section 26 of Title 51, supra, which allows the **owner of the share of stock or the corporation to appeal from the final assessment of the tax.** In a situation where the corporation has become liable to pay the tax and has become insolvent or unable to pay, the individual shareholder is personally liable for the tax to the extent of the share owned by him. **Pratt v. State**, 25 Ala. App. 258, 145 So. 163; Quarterly Report of Attorney General, Vol. 56, page 105.

In checking the assessment records on file with the Department of Revenue, I find that the corporation in question agreed to pay the tax for the shareholders as provided in Section 28, *supra*. Hence, it appears that effort should be made to collect the tax out of the corporation, and if it has no tangible property upon which to levy, the shares should stand for the tax by offering them for sale as the assessment is against the shares of stock. **Pratt v. State**, *supra*. However, if for any reason, the amount of the assessment cannot be realized out of the corporation or by a sale of the stock, the shareholder would become personally liable for the tax as held in **Pratt v. State**, *supra*.

I have not attempted to answer each of your questions as numbered in the foregoing part of the opinion, but have answered them in the discussion of the question as set out above.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 11, 1963

Honorable John T. Black
Solicitor, Ninth Judicial Circuit
Fort Payne, Alabama

Solicitors — Expenses — Constitutionality

Act No. 352, H. 485, approved August 30, 1963, providing for an increase in or addition to an existing expense allowance for the solicitor of the Ninth Judicial Circuit, does not come within the inhibition of Section 68, Section 281, or Amendment XCII (92), of the Constitution of Alabama 1901 as the provisions thereof do not constitute an increase in the compensation of said officer during the term for which he was appointed or elected.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of October 7, 1963 is as follows:

“Act No. 352 of the regular 1963 Legislature was approved on August 30, 1963, and provides in effect an additional expense allow-

ance of Three Hundred Dollars (\$300) for the Circuit Solicitor of the Ninth Judicial Circuit for each county allowance now authorized by law for expenses.

"The Comptroller has requested that I obtain an opinion from your office with regard to payment of same on the effective date, which was August 30, 1963.

"I would therefore appreciate receiving your opinion, with copy to Mr. Graves, as to whether the expenses authorized under this Act can be paid during my present term.

"In this connection, I would refer you to a similar allowance authorized by the 1957 Legislature as shown in Section 241(1), Title 13, for the Circuit Solicitor of the affected Circuits. The same provisions apply to the Judges of the affected Circuits by Section 178(1) of Title 13."

In my opinion, Act No. 352, H. 495, approved August 30, 1963, does not come within the inhibition of Section 68, Section 281, and Amendment XCII (92) of the Constitution of Alabama 1901 as the provisions thereof do not constitute an increase in the compensation of the officer in question during the term for which he was appointed or elected.

Act No. 352, *supra*, provides as follows:

"Section 1. In addition to the expenses now allowed by law to Circuit Solicitors pursuant to Section 241, Title 13, Code of Alabama, 1940, there shall be paid to Circuit Solicitors in the Ninth Judicial Circuit the sum of Three Hundred Dollars per annum for each County of the Circuit, over and above one, the said additional allowance to be reimbursement for reasonable expenses while in attendance upon Court outside of their home county, to be paid from the treasury monthly.

"Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

A flat expense allowance, if based on a reimbursement to the officer concerned for expenses incurred by him in the performance of his official duties and bearing a reasonable and substantially accurate relationship to the actual expenses incurred, is not considered as an increase in compensation and may be given to said officer during his term.—Quarterly Report of Attorney General, Volume 81, page 43; letter to Honorable Sim L. Howell, Chairman, Board of Revenue and Control, Morgan County, Alabama, dated October 13, 1955. This is likewise true as to an increase in an expense allowance already existing.

Act No. 352, supra, being merely a slight increase in, or addition to, an existing expense allowance for the solicitor in question as a reimbursement for reasonable expenses, in my judgment, comes within the above rule. Said act, therefore, is not within the inhibition of the constitutional provisions above mentioned, and may become effective during the term of the present incumbent.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 11, 1963

Honorable L. B. Davidson
Director of Revenue
City of Gadsden
Gadsden, Alabama

Interstate Commerce — Licenses — Municipalities —
Taxation.

1. A municipal ordinance which imposes a license tax upon firms for transporting goods into the municipality and there making delivery of such goods applies to out of state firms.
2. Under such ordinance the taxable event occurs within the municipality.
3. Such a license tax is not a burden upon interstate commerce.
4. A license ordinance, which imposes a tax upon foreign firms not in excess of that imposed upon local firms engaged in a similar business, is not discriminatory.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of September 19, 1963, is as follows:

“Will you please give us an Attorney General’s ruling on the enclosed copy of affidavit.

"Even though this company might be from out of the State, they are in competition with similar local concerns and intra-state concerns.

"Enclosed is a copy of our license schedule governing this operation."

The question presented by your request and enclosures is whether the license ordinance of the City of Gadsden imposes a license tax upon the All Purpose Service Company of Atlanta, Georgia.

The affidavit attached to your request was executed by the President of said Company. Said affidavit reads in part as follows:

"That All Purpose Service Company employs sales personnel who drive trucks throughout the Southeast soliciting orders of merchandise and making deliveries over regular routes. These salesmen call upon retailers and take orders of merchandise to be delivered the next time the salesmen passes through the town in which the order is taken. These orders are submitted to All Purpose Service Company for their approval or rejection. If an order is approved, the order is processed through All Purpose Service Company's IBM invoice-billing system. A copy of the invoice, together with the goods, which have been ordered, are placed together in the delivery truck and these goods are subsequently delivered to the purchaser, at the time of which delivery new orders are solicited for the following delivery date."

Paragraph 271 of the license ordinance of the City of Gadsden, imposes a license tax upon persons, firms and corporations which unload, deliver, distribute or dispose of any goods, wares or merchandise in the City of Gadsden which said goods, wares or merchandise was transported from a point outside said City to a point within said City. Said paragraph also provides that no license shall be required thereunder in excess of that required of local businesses engaged in similar operations.

In an opinion reported in Quarterly Report of Attorney General, Vol. 89, page 41, this office considered a municipal license schedule similar to said paragraph 271 of the license ordinance of the City of Gadsden. We there held that such a license schedule applies to all firms which deliver goods, wares or merchandise into the corporate limits of a municipality. The taxable event occurs within the municipality. Quarterly Report of Attorney General, Vol. 104, page 21. The tax is not a burden upon interstate commerce. **Sanford Service Company, Inc. v. City of Andalusia**, 256 Ala. 507, 55 So. 2d 856.

Under the provisions of the ordinance here considered, no question of discrimination in favor of local businesses is presented. There-

fore, your problem is not controlled by the case of **West Point Wholesale Grocery Company v. City of Opelika**, 354 U. S. 390, 1 L. Ed. 2d 1420.

For these reasons, I am of the opinion that the license ordinance of the City of Gadsden imposes a license tax upon the All Purpose Service Company of Atlanta, Georgia.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 11, 1963

Honorable Fate Calton
President, City Council
City of Eufaula
Eufaula, Alabama

Hospitals — Municipalities.

1. A municipality is not liable for injuries caused in the performance of its governmental functions.

2. Crime investigation by a police officer is a governmental function.

3. A municipality is not liable for hospital bills incurred by a person shot by a police officer while attempting to make an arrest.

4. A municipality may pay the hospital bills incurred by an indigent person.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of September 13, 1963, is as follows:

"We would like your opinion on the following set of facts:

"On May 1, 1963, the City Police of the City of Eufaula, Alabama, received a call stating that a robbery had been committed in the city. Upon investigation, they obtained a description of the suspect from a witness, and, from this description, located the suspect at

a colored night spot in Eufaula, Alabama. When he walked out of the establishment, they apprehended him and told him that he was under arrest and told him to get in the police car. Instead of getting in the car, the suspect ran and the police fired several warning shots over his head. When he failed to stop, he was shot by one of the policemen, although at this time, the policeman did not realize that he had hit the suspect. The suspect continued home and an ambulance was called by someone there, and he was taken to Barbour County Hospital where he was admitted. The police went to the hospital and told the administrator of the hospital that they did not want anyone talking with the suspect until they had an opportunity to question him. The next morning they returned to the hospital and talked with the doctor who had operated on the suspect the night before. He stated that they could not talk with the suspect until the next day, May 3, 1963. On May 3, 1963, they returned to the hospital in company with the Barbour County Sheriff. At this time, the Sheriff arrested the suspect on a warrant issued by the County Solicitor. The suspect made a full confession and is now waiting trial. He remained in the hospital for 43 days and incurred a large hospital bill. He is indigent and the hospital involved is a Hill-Burton Hospital.

"The question now is whether or not the City of Eufaula or Barbour County is liable for the hospital bill incurred by the suspect for treatment as a result of this shooting. Also, if the City is not legally liable for this hospital bill, can the City Council legally pay the hospital if it wishes."

A municipality is not liable for injuries caused by the wrongful or negligent performance of its governmental functions. **City of Bay Minette v. Quinley**, 263 Ala. 188, 82 So. 2d 192.

In investigating a crime and attempting to make an arrest, a police officer is performing a governmental function of the municipality. **Hillman v. City of Anniston**, 214 Ala. 522, 108 So. 539. See also **City of Birmingham v. Brock**, 242 Ala. 382, 6 So. 2d 499.

Therefore, I am of the opinion that the City of Eufaula is not liable to the Barbour County Hospital for the cost of the medical treatment given to the prisoner to whom your request refers.

Under the facts presented, I know of no theory by which Barbour County may be held liable for the cost of said medical treatment.

Title 37, Section 494, Code of Alabama 1940, authorizes the City of Eufaula to pay for the medical treatment here considered since said prisoner is an indigent person. Therefore, you are advised that said

City may pay the cost of said medical treatment if the City Council so desires.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 11, 1963

Honorable E. N. Rodgers, Director
State Highway Department
Montgomery 4, Alabama

Counties — Roads and Bridges — Highway and Highway
Departments — Funds — Words and Phrases.

1. The word "resource," or resources, is defined by Webster's New International Dictionary, Second Edition, Unabridged, to be, among other things, "a new or a reserve source of supply or support"; "something in reserve or ready, if needed"; both "immediate and possible sources of revenue."

2. Counties who lack funds with which to match state-county aid funds under the Farm to Market Road Act may receive funds upon the approval of the Governor and the State Highway Department from the Alabama Highway Authority out of the proceeds of the \$100,000,000 bond issue arising from Act No. 26, First Special Session 1963, and use same, or a portion thereof, for matching SACP funds under, and for county road construction as defined in, the Farm to Market Road Act, in view of Act 285, First Special Session 1963.

Opinion by Assistant Attorney General Madison.

Dear Sir:

I have your request for an opinion of this office under date October 1, 1963, which is as follows:

"Your attention is called to Act No. 285, House Bill 183 by Mr. Fite, passed at the Regular Session of our Legislature. The sole intent of this Act was to allow the counties to use monies allocated from the new bond issue to them under a formula by Governor Wallace to match SACP funds in escrow to them in the Highway Department for the use of the construction of county roads. A great many

of the counties are unable to obtain SACP funds because they do not have available county funds to match as required under the Law. This would result in a much larger county construction program and be very beneficial to all the counties.

"Some question has arisen regarding the last sentence of Section 1 of this Act because of the word 'resources' used to define the intent of the law.

"I therefore request an informal opinion from your office clarifying our right to use our new bond money to carry out the intent of this Act. It would be very helpful if you would give us this opinion at your earliest opportunity as we are in daily conferences with the counties working out agreements to proceed with our county road construction."

The Farm to Market Road Act in material part is set forth in Act No. 329, Regular Session 1943, as amended, and appearing in the 1958 Code of Alabama as Recompiled as Article 7, Chapter 1, Title 23.

As written before the passage of Act No. 285, Regular Session 1963, the above Farm to Market Road Act contemplated that the cost of county road construction, etc., under the act be equally borne by the State Highway Department and the county.

There has been set up in the treasury under the Farm to Market Road Act a special fund to be known as the state-county aid fund, which is used by the State Highway Department for matching county funds.

By complying with the provisions of said Farm to Market Road Act, a county is entitled to receive from said state-county aid fund its proportionate share to be used for the construction of county roads as defined by Act No. 285, *supra*.

A great many counties in the state are unable to obtain state-county aid funds because they do not have available county funds to match the state aid funds available for their use in their county road programs.

Act No. 26, First Special Session 1963, authorized the Alabama Highway Authority to sell and issue \$100,000,000 principal amount of bonds, the proceeds after certain deductions to be used as follows:

". . . The proceeds of the bonds, other than refunding bonds, remaining after paying the expenses of their issuance shall be turned into the State treasury, shall be carried in the public road and bridge fund, and shall be subject to be drawn on by the corporation, upon the approval of the State Highway Department and the

Governor, but only for the purpose of paying the cost of constructing and reconstructing public roads and bridges or work incidental or related thereto in the State, including the acquisition of property necessary for such construction and incidental and related work . . .”

Act No. 34, First Special Session 1963, declared that all city and town streets and roads in the State of Alabama serve a State purpose and are for the benefit of the State.

If Governor Wallace and the State Highway Department approve the allocation of funds to a county or counties from the \$100,000,000 bond proceeds for the construction of public county roads as defined in the Farm to Market Road Act as last amended, the Alabama Highway Authority is then authorized to draw on the said bond funds in the treasury for the purposes and in the amount or amounts authorized by the Governor and the State Highway Department. When so approved by the Governor and State Highway Department, the amount to be paid to any county unable to match SACP funds in escrow for it becomes a “monetary resource” within the meaning of Act No. 285, *supra*, which provides that “county funds” or words of like import shall mean any available monetary resources (other than federal aid funds) from whatever source derived. The word “resource,” or resources, is defined by Webster’s New International Dictionary, Second Edition, Unabridged, to be, among other things, “a new or a reserve source of supply or support”; “something in reserve or ready, if needed”; both “immediate and possible sources of revenue.”

I am of the opinion therefore that the counties who are unable to obtain SACP funds because they do not have available matching county funds may use funds allocated and received by them from the proceeds of the said \$100,000,000 bond issue for matching purposes and thereby receive their part from the state-county aid fund.

The requirement of gubernatorial and departmental approval before such expenditures may be made from the bond proceeds should militate against any unwise use of the funds in question.

It is assumed that the authorized use of the funds is in accordance with the proper and appropriate resolution adopted by the Alabama Highway Authority and that all necessary contracts are executed for the construction, reconstruction or relocation of the public roads and bridges in question.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 14, 1963

Hon. W. Cecil Johnson
Judge of Probate
Clarke County
Grove Hill, Alabama

Counties — Industrial Development Board.

The governing bodies of the several counties may make appropriations to industrial development boards incorporated under the provisions of Title 37, Sections 815, et seq., Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of September 18, 1963, is as follows:

"The Court of County Commissioners of Clarke County, Alabama, has been requested to make a substantial contribution out of the funds of this County to The Industrial Development Board of the City of Jackson. This Industrial Board is incorporated under the Cater Act (Title 37, Sections 815-830(1), Code of Alabama 1940, as recompiled; it was incorporated in this County for operation in connection with the City of Jackson, Alabama, which, of course, is also located in this County.

"Clarke County, Alabama, through its Court of County Commissioners, would like to make a donation to this Board and we hereby respectfully request your official opinion as to the legality of such a donation."

My answer to your inquiry is in the affirmative.

The only possible prohibition against a county contributing its funds to an Industrial Development Board is contained in Section 94 of the Constitution of Alabama 1901, which reads as follows:

"Sec. 94. The Legislature shall not have power to authorize any county, city, town or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

I do not, however, think that Section 94 of the Constitution is applicable to the situation here considered.

Title 12, Section 12, Subsection 22, Code of Alabama 1940, Recompiled 1958, reads as follows:

"22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision."

Title 37, Section 816, Code of Alabama 1940, Recompiled 1958, declares it to be the legislative intent that the main purpose of an Industrial Development Board is the promotion of industries and the development of trade by inducing manufacturing, industrial and commercial enterprises to locate in this State, and further the use of its agricultural products and natural resources.

It is to be noted that the ends to be accomplished under Title 12, Section 12, Subsection 22, *supra*, and Section 816, *supra*, are one and the same, viz. to develop and advertise the agricultural and industrial resources of the county and city.

It is recognized that a municipal corporation, which includes the county, may engage in the advertisement and promotion of the community when so authorized by the Legislature. 37 Am. Jur., Municipal Corporations, Section 12, Page 740. See also 79 A.L.R. 466.

Clearly the Legislature, by its enactment of Subsection 22, *supra*, authorized the county governing body to use county funds for promoting and advertising the county and for bringing new industries into the cities and the county.

The Industrial Development Boards incorporated under the provisions of law are strictly non-profit corporations. This office has heretofore rendered several opinions to the effect that counties may donate funds to non-profit organizations where a public purpose is involved without violating Section 94 of the Constitution. When the purpose to be accomplished is of a public nature as is enumerated in the statutes, particularly Title 12, Section 12, Subsection 22, Code of Alabama 1940, Recompiled 1958, it is a function of the county or a purpose for which county funds may be expended. This office has uniformly held that such expenditures are authorized. It has also been held that a county

may donate funds to the following: The Alabama-Coosa River Improvement Association, Quarterly Report of Attorney General, Vol. 55, page 110; Piedmont Livestock Show Barn and Youth Center, Inc., Quarterly Report of Attorney General, Vol. 53, page 185; Cattle Show and Fair Association which was a non-profit association, Quarterly Report of Attorney General, Vol. 51, page 151; Artificial Breeding Association, Quarterly Report of Attorney General, Vol. 49, page 86; and to the Cancer Control Program, Quarterly Report of Attorney General, Vol. 47, page 76. See also opinion to Hon. James T. Beeland, Judge of Probate, Butler County, under date of October 9, 1959, a copy of which is enclosed for your consideration.

I am of the opinion that your county may legally make an appropriation to the Industrial Development Board of the City of Jackson and I am further of the opinion that the county is not prohibited by Section 94 of the Constitution from donating or contributing funds to an Industrial Development Board, especially in view of the fact that the entire program of such board is designed to bring new industries into the county.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 14, 1963

Mrs. Myrtle M. Trott
Deputy Administrator
Circuit Court of Mobile County, Alabama
P. O. Box 298
Mobile, Alabama

Costs and Fees — Criminal Law

Court costs not properly taxed against defendant where case is dismissed or nol prossed.

Opinion by Assistant Attorney General Bridges.

Dear Mrs. Trott:

Your request for an official opinion bearing date of September 26, 1963, is as follows:

"Would you please advise me at an early date if it is proper to tax

the defendant with the costs of court when a case is either dismissed or nolle prosequi upon payment of the court costs?

"The State Auditors have given me a copy of an opinion dated September 29, 1951, directed to Hon. Rose Huey in which it states the following:

"You are, therefore, advised that any order of nolle prosequi or dismissal predicated upon payment of costs by the defendant is inoperative and void, and that no costs or fees are properly assessable against the defendant thereunder, etc."

It is not proper to tax the costs of the court against the defendant in a criminal case when the case is dismissed or nol prossed "upon payment of the court costs."

Court costs and fees are assessable against the defendant in a criminal case only upon his conviction. There is no authority of law for taxing costs in the event the case against the defendant is nol prossed or dismissed. **Bilbro v. Drakeford**, 78 Ala. 318; **Melton v. State**, 30 Ala. App. 136, 1 So.2d 920; Quarterly Reports of the Attorney General, Vol. 6, page 156; Vol. 54, page 118; Vol. 64, page 63.

The opinion of this office dated September 29, 1951 directed to Honorable Rose Huey and quoted in your request is found in Quarterly Report of Attorney General, Vol. 64, page 63. That opinion is hereby reaffirmed.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 16, 1963

Honorable George T. Culp
Tax Collector
Court House
Huntsville, Alabama

Elections — Poll Tax and Poll Lists.

The liability for the payment of poll taxes does not depend on the length of a person's residence in this State but on his status as of October 1 of any given year, subject to 2 years maximum amount of tax.

Opinion by Assistant Attorney General Hall.

Dear Mr. Culp:

Reference is made to your lengthy letter dated October 1, 1963, making numerous inquiries with regard to the liability for the payment of poll taxes by persons moving into Alabama and becoming residents thereof.

Without repeating your several questions, I think that they can all be answered by setting forth the following general propositions:

1. The date of registration to vote does not determine the liability for the poll tax.

2. If a person over 21 and under 45 and is not otherwise exempt, becomes a resident of this State on or before October 1 of any given year he is liable for the poll tax for that year, and it must be paid on or before February 1 of the succeeding year.

3. If a person over 21 and under 45 is not otherwise exempt, becomes a resident of this State after October 1 of any given year, he is not liable for the poll tax until October 1 of the next year.

4. The liability for payment of poll taxes does not depend on the length of a person's residence in this State but on his status as of October 1, of any given year, subject to the 2 years maximum amount of tax assessable of \$3.00 under Amendment XCVI (96) to the Constitution of Alabama 1901.—Quarterly Report of Attorney General, Vol. 73, page 81.

In this connection, see **Shepherd v. Sartain**, 185 Ala. 439, 454-455; 64 So. 57, 63-64. Quarterly Report of Attorney General, Vol. 1, p. 268, 269.

I hope that this answers your several questions.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 16, 1963

Mr. Woods H. Franks
Route 1, Lamar County
Guin, Alabama

Elections — Board of Registrars — Voters — Registration.

The General laws regarding visitation in the precincts in a county by Boards of Registrars vests no discretion in the Boards governed thereby to meet for 30 days at the Court House instead.

Opinion by Assistant Attorney General Hall.

Dear Mr. Franks:

I have your letter dated October 8, 1963, which is as follows:

"Would appreciate your opinion in regard to the duties of Board of Registrars fulfilling their required responsibilities in compliance with Title 17, Section 26 of 1940 Alabama Code. We have been advised by some that this Section has been amended by the 1961 Legislature giving the Board at their discretion and if they think it practical to use the 30 days in session at the Court House to receive applications from those who are qualified to register.

"Please advise me at your earliest convenience just what procedure to use."

Title 17, Section 26, Code of Alabama 1940 (Recompiled 1958) was last amended by Acts of 1959, p. 1456 to read as follows:

"Board of registrars to hold fixed meeting and give notice thereof.

The board of registrars in each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, except that in counties having more than three hundred thousand popu-

lation as shown by the last preceding census, the time shall not exceed seventy-five working days. The board of registrars in each county shall meet at the courthouse on the third Monday in January, 1940, and each two years thereafter and shall remain in session ten working days for the registration of voters. During even numbered years, the board of registrars in each county, in its discretion, may visit any of the precincts of the county on such days as the board shall determine for the registration of voters; but the time consumed in such registration of voters shall not exceed a total of twenty working days in any one calendar year. In the manner prescribed herein, the board shall give notice of the time when, and the place in the precinct where, they will attend to register applicants for registration."

Title 17, Section 27, Code of Alabama 1940 (Recompiled 1958) was amended by Acts of 1961, p. 1544, to read as follows:

"Special registration.—In addition to the regular registration provided in this article, the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1941, and each two years thereafter, and it shall be mandatory for the board of registrars to meet on the first Monday in July, 1940, and each two years thereafter, and remain in session at each of said meetings five days for the purpose of registering voters, and the board shall meet on the first Monday in July, 1941, and each two years thereafter and shall remain in session at each of said meetings five days for the purpose of registering persons entitled to register, except that in counties having a population of not more than 300,000 according to the last or any subsequent federal census, this section shall not apply, and except that in counties having more than 300,000 population, as shown by the last or any subsequent federal census, it shall be mandatory for the board of registrars in said counties having more than 300,000 population, as shown by the last or any subsequent federal census, in addition to the meetings provided for in section 26 of this title, to meet as follows and for the following purposes: the board shall meet on the second Monday in April, the fourth Monday in June, the first Monday in August, the Monday in October and the first Monday in December, 1940, and each two years thereafter, and shall remain in session at each of said meetings for ten days for the purpose of registering persons entitled to register; the board shall meet on the first Monday in February, the first Monday in April, the first Monday in June and the first Monday in August, 1941, and each two years thereafter, and shall remain in session at each of said meetings for ten days for the purpose of registering persons entitled to register. Any voters who may become qualified after a qualified voting list has been made and published as now

provided for by law during even numbered years may be added to the list of qualified voters by a supplementary list or lists without making a complete new list of qualified voters."

Title 17, Section 27(1), Code of Alabama 1940 (Recompiled 1958) was amended by Acts of 1961, p. 730, so that it now reads as follows:

"Registration of persons in armed forces and affiliated organizations.

—All persons in the armed forces of the United States, the Merchant Marine, the Red Cross, and all other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the state of Alabama to register, are authorized to register to vote at any session of the board of registrars of the county of their residence and in which they are otherwise qualified to vote.

"The board of registrars of every county of the state of Alabama shall be in session at the court house, or one of the court houses, of their county on the first and third Mondays in each month for the purpose of registering all persons in the armed forces of the United States, Merchant Marine, Red Cross, and other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the state of Alabama to register, except that in all counties having populations of not less than 300,000 nor more than 500,000 according to the 1960 or any subsequent federal decennial census, the board of registrars shall meet for one week each month beginning on the first Monday in February of each year and on the first Monday of each month thereafter in lieu of the first-and-third-Monday meetings required by this section.

"This section shall not modify, change, repeal, or affect any act, local or special, providing continuous or monthly sessions of the board of registrars of any county of this state."

There are a number of Acts which have been passed applying to registration in counties in certain population categories, but inasmuch as Lamar County had a population of 14,271 according to the 1960 census it does not fall within any of the categories covered by such Acts. Therefore the dates for registration in Lamar County are governed by the provisions of Title 17, Sections 26, 27, and 27(1) of the Code.

You will see by an examination of Section 26 that although the Board is required to visit each precinct at least once between October 1 and December 31 in odd numbered years and may consume not more than 30 days in doing so, there is not discretion vested in the

Board to forego such visits and to sit at the Court House instead for 30 days.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 17, 1963

Hon. Ralph P. Eagerton
Chief Examiner
Department of Examiners of Public Accounts
State of Alabama
Montgomery, Alabama

Clerks of Circuit Courts — Costs and Fees — Grand
Juries — Words and Phrases.

1. Act No. 570, Acts of Alabama 1963, Regular Session, authorizing three-dollar fee to circuit clerks for cases docketed in grand jury dockets suspended by operation of law until beginning of new term of office.
2. Act No. 570, supra, authorizes fee for matters on which "true bill" or "no bill" is returned only.
3. Word "case" as used in Act No. 570, supra, means each subject of inquiry docketed.
4. Act No. 570, supra, shall apply to subjects docketed after beginning of new term of office.

Opinion by Assistant Attorney General Webb.

Dear Mr. Eagerton:

I have received your letter of October 14, 1963, requesting an official opinion of this office, which is as follows:

"During the Regular Session of 1963, the Legislature passed Act No. 570, granting to the various clerks of the circuit courts a fee of Three Dollars (\$3.00) for each case docketed on the grand jury docket. I request your official opinion as to the following portions of that act:

- "1. Does this act take effect for purposes of collection of fees authorized during the present term of the various circuit clerks?

"2. In many instances the grand jury investigates subjects docketed with no action being taken, that is, neither a 'true bill' or 'no bill' being returned. May the clerks collect the fee for these cases?

"3. What definition should be applied to the word 'case' as used in Act No. 570, supra?

"4. Section 2 of Act No. 570, supra, states, in pertinent part, as follows:

"... it shall apply only to cases which are begun after its effective date."

"What meaning shall be applied to this phrase?"

Act No. 570, Acts of Alabama 1963, Regular Session, in my opinion, is suspended by operation of law and becomes operative at the expiration of the present term of office of the various clerks of the circuit courts. Amendment XCII of Constitution 1901 prohibits increase in compensation during term of office in incumbent holder. (See also: Section 281 of Constitution 1901.) See **Hawkins v. Jefferson County**, 233 Ala. 49, 169 So. 720 and **State Docks Commission v. State ex rel. Jones**, 227 Ala. 521, 150 So. 537.

I note that under the provisions of Section 1 of Act No. 570, supra, the clerk of the circuit court shall be entitled to a fee of Three (\$3.00) for each case docketed, to be taxed as part of the cost of the case and collected in the same way other costs are collected. If "No bill" is found, the fee shall be paid from the fine and forfeiture fund, or the county general fund, as appropriate. The law, thus, makes provision for the taxing as a part of the cost of the case in "true bill" cases and payment from the fine and forfeiture fund in "no bill" cases. However, no provision is made for those items docketed upon which the grand jury takes no action and returns neither a "true bill" or a "no bill." I am, therefore, of the opinion that when no action is taken and neither bill is returned, no fee shall be attached, taxed or collected. Title 11, Section 1, Code of Alabama 1940.

In a legal sense, the word "case" means "suit" but, in its ordinary usage, it means "event," "happening," "situation," "circumstances." See **Highfield v. Delaware Trust Company**, 188 A. 919 (922) and Words and Phrases, Vol. 6, page 208. The courts have further held that as this word is used in a statute authorizing a challenge to an individual grand juror, any matter that might become a subject of inquiry by the grand jury shall constitute a "case." See **People v. Prior**, 268 App. Div. 717, 54 N.Y.S. 2d 150 (153), and Black's Law Dictionary, Fourth Edition. I am, therefore, of the opinion that as the word "case" is used in Act

No. 570, supra, the same means each subject of inquiry docketed on the grand jury docket.

With relation to your fourth question, I am of the opinion that the phrase cited by you in Section 2 of Act No. 570, supra, means those matters or subjects of inquiry docketed on the grand jury docket on or after the first day of the next term of office of the clerk of the circuit court. In this regard, note those cases cited in answer to Question No. 1.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 18, 1963

Honorable L. B. Stephens, Executive Director
State Board of Pardons and Paroles
State Administrative Building
Montgomery 4, Alabama

Pardon, Parole, and Probation.

The provision in Title 42, Section 16, Code of Alabama 1940, as amended by Acts 1951, page 1030, "The board shall have no power to grant a pardon, order a parole, remit a fine or forfeiture or restore civil and political rights until thirty days' written notice that the prisoner is being considered therefor has been given by the board to the judge and the solicitor who tried the subject's case; provided, that if they be dead or not serving, such notice shall be given to the solicitor and one of the judges of the circuit in which the subject was convicted," is jurisdictional and cannot be waived.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of October 9, 1963 is as follows:

"The members of the State Board of Pardons and Paroles have asked that I request your official opinion on the interpretation of a portion of Section 16 of Title 42, Code of Alabama, 1940, as amended, which reads as follows: ' . . . The board shall have no power to grant a pardon, order a parole, remit a fine or forfeiture

or restore civil and political rights until thirty days' written notice that the prisoner is being considered therefor has been given by the board to the judge and the solicitor who tried the subject's case; provided, that if they be dead or not serving, such notice shall be given to the solicitor and one of the judges of the circuit in which the subject was convicted.'

"The Board would like to know whether the Judge and Solicitor may waive this notice. There are conflicting opinions from the Attorney General on this issue and, therefore, the Board wishes a clarification.

"We call your attention to a letter directed to the Board from the Attorney General under date of December 6, 1951, which held that the Judge and Solicitor could waive such notice. We also call your attention to a letter from the Attorney General dated August 9, 1961, which reversed the above opinion and stated that such notice was jurisdictional and, therefore, could not be waived.

"The Board would appreciate an early opinion from you clarifying this matter."

In answer to your inquiry, it is my opinion that the thirty days' written notice required by that portion of Section 16 of Title 42, Code of Alabama 1940, as amended, quoted in your letter, is jurisdictional, and, therefore, cannot be waived.

After mature consideration of the question involved, I have reached the conclusion that the latest expression of this office, found in the letter addressed to Mr. W. H. Swearingen, Chairman, State Board of Pardons and Paroles, under date of August 9, 1961, is correct and should be followed. In said letter it was stated:

"A further question arises in this regard as to whether the Board may legally accept a waiver of the thirty days' Notice to the Circuit Solicitor and Circuit Judge, which said Notice is required by the following provisions of Title 42, Section 16, Code of Alabama Re-compiled 1958:

"The board shall have no power to grant a pardon, order a parole, remit a fine or forfeiture or restore civil and political rights until thirty days written Notice that the prisoner is being considered therefore has been given by the board to the judge and the solicitor who tried the subject's case; provided, that if they be dead or not serving, such Notice shall be given to the solicitor and one of the judges of the circuit in which the subject was convicted.'

"In my opinion, the foregoing provisions are jurisdictional in nature.

That is, the board is without jurisdiction to grant a parole until the expiration of the thirty days' written Notice. And has 'no power' in the matter of a parole until such time has expired. The 'thirty days' written notice being jurisdictional, it is my further opinion that such cannot be waived by the Solicitor or the Circuit Judge."

I wish to point out that that portion of Section 16, supra, under consideration, was added in Act No. 599, Acts 1951, page 1031, which amended Chapter 1, Title 42, Code of Alabama 1940, relating to the administration of pardons, paroles, and the remission of fines and forfeitures. It further limited the powers of said Board formerly provided for in said Section 16. In other words, said addition added further conditions precedent upon the Board before it had the authority to act. It will be noted that the verbage is, "The board shall have no power to grant a pardon, order a parole, remit a fine or forfeiture or restore civil and political rights until thirty days' written notice, etc." This, in my judgment, placed a further limitation on the power of the Board, and is jurisdictional in nature and cannot be waived.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 21, 1963

Honorable Howard Kirby, Clerk
Etowah County Circuit Court
Gadsden, Alabama

Costs and Fees — Solicitors — Motor Carriers.

Solicitor's fee of \$10.00 attaches in case of conviction of violation of Section 11 of Act No. 674, Acts of Alabama 1961, page 925, relating to operation of motor carrier without required cab card prescribed by Commissioner of Revenue. Such offense is not a violation of the revenue law, but is within category of "each conviction of a misdemeanor, not otherwise provided for," under Title 11, Section 85, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Your request for an official opinion bearing date of October 15, 1963 is as follows:

"Please refer to Section 11 of Act 674 of the 1961 Session of the Legislature of Alabama, and render to me your opinion as to

whether or not a Solicitor's fee should be taxed and collected in cases where a defendant pleads guilty or is tried and convicted on charges as stated in said section of said act.

"If a Solicitor's fee is taxable in such cases, should the amount be Thirty Dollars under provisions of Section 85, Title 11 of the Alabama Code, or should it be less, and if so what amount should it be?"

In answer to your inquiry, it is my opinion that a solicitor's fee of \$10.00 will attach under the provisions of that portion of Title 11, Section 85, Code of Alabama 1940, which provides, "For each conviction of a misdemeanor, not otherwise provided for . . . \$10.00."

Section 11 of Act No. 674, Acts of Alabama 1961, page 925, provides for a cab card for motor vehicles operated by a motor carrier under rules and regulations of the Commissioner of Revenue for a fee of \$1.00, and makes it illegal for a motor carrier to operate or to cause to be operated in this State any motor vehicle as defined unless the motor vehicle carries the cab card required. Section 13 of said act makes the failure to comply with the rules and regulations issued by the said Commissioner a misdemeanor.

Although Act No. 674, *supra*, further provides for the imposition of an excise tax on motor fuel used by motor carriers, yet, in my judgment, Section 11 of said Act is merely a regulatory measure and does not amount to a revenue law.

In view of the above, a conviction of a violation of Section 11 of Act No. 674, *supra*, in my judgment, merely carries a \$10.00 solicitor's fee "For each conviction of a misdemeanor, not otherwise provided for and not a \$30.00 solicitor's fee "For each conviction of a violation of the revenue law, not otherwise provided for," under Title 11, Section 85, Code of Alabama 1940, *supra*. This is in accordance with a former opinion of this office reported in Quarterly Report of Attorney General, Volume 2, page 39, wherein a like conclusion was reached in the case of a conviction of a violation of the Drivers License Act.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 23, 1963

Hon. Richard E. McPherson
Judge of Probate
Choctaw County
Butler, Alabama

Hon. Leon Clark
Sheriff
Choctaw County
Butler, Alabama

Choctaw County — Statutes — Sheriffs.

1. Under the provisions of Act No. 281, 1963 Regular Session of the Legislature (Ms.), the governing body of Choctaw County has no discretion in fixing the salary of the first and second deputies sheriff.

2. Where the language used in the statute is clear and unambiguous, there is no room for statutory construction.

Opinion by Assistant Attorney General McQueen.

Gentlemen:

Your requests for official opinions bearing dates of October 8, 1963, and October 10, 1963, are as follows:

"I would appreciate it very much if you would advise me as to whether it is mandatory that the governing body of Choctaw County increase the salary of the first deputy sheriff of Choctaw County to \$4,800 per annum and the salary of the second deputy sheriff to \$3,900 per annum. The governing body of Choctaw County asked me to make this request of you, as it would appear in the title of the Act that the Court of County Commissioners have the authority to fix the salaries, while in the body of the Act is used the word 'shall.'

"Actually, what I need to know is if Act No. 281 automatically gave the two deputy sheriffs' raises, or is this permissive legislation to let the Court of County Commissioners fix the salaries up to the limits outlined in the Act?

"For your convenience, I am enclosing a copy of the Act in question."

— — — — —

"I would appreciate an opinion in regard to the following question:

"Does the court of county commissioners of Choctaw County, Alabama, have any discretion in setting or fixing the salaries of the first and second deputies of the Sheriff Department, since the passage of Act No. 281, Senate Bill 315, Approved August 27, 1963."

Act No. 281, Regular Session of the Legislature 1963 (Ms.), Section 1 thereof, provides as follows:

"Section 1. The salary of the first deputy sheriff of Choctaw County shall be \$4,800 per annum and the salary of the second deputy sheriff appointed under authority of Act No. 107, H. 352, Regular Session 1955 (Acts 1955, p. 353) shall be \$3,900 per annum. The court of county commissioners, board of revenue or like governing body of the county shall pay such salaries monthly by warrant drawn upon the general fund of the county."

The language used in this statute is clear and unambiguous to the effect that the salary of the first deputy sheriff of Choctaw County shall be \$4,800.00 per annum and that the salary of the second deputy sheriff shall be \$3,900.00 per annum.

It is a well known rule of statutory construction that where the language of the statute is clear and unambiguous and the intent is obvious, there is no room for construction. Alabama Digest, Statutes, Key No. 190, and cases thereunder cited.

Mention is made in letter from Judge McPherson that there is a variance between the title of the act and the enacting part of the statute. Where this situation exists, you can look to the title only as an aid to construction where the language used in the enacting part is ambiguous. This is not the situation which exists in this statute. Therefore, since the enacting clause, that is Section 1 of said act, is clear, plain and unambiguous, I cannot resort to rules of statutory construction as this statute admits of no construction.

Specifically answering your question, it is my opinion that the governing body of Choctaw County has no discretion in fixing the salary of the deputies sheriff here considered, as their salary is fixed automatically by Act No. 281 in the amount therein provided.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 24, 1963

Mr. R. P. Allen, Jr., President
Board of Revenue
Marengo County
Linden, Alabama

Counties — Highways — Public Utilities.

Counties not liable for utility relocation costs under Act 474 of the 1961 Legislature.

Opinion by Assistant Attorney General Cage.

Dear Mr. Allen:

I have your letter of October 9, 1963, requesting an opinion of this office which is as follows:

"Please allow me to familiarize you with certain circumstances that exist in Marengo County before I ask for a ruling from your office.

"Several years ago a public utility moved into the lower half of our county and buried cable on the right of way of numerous county roads without securing easement from the county. Some of these roads have been improved and they followed our outer edge right of way; when they came to unimproved roads they buried cable at will. The county is in the process of improving all of our roads and we are faced with utility cable which makes it impossible to construct without considerable damage to said cable.

"The owner of the public utility appeared before us and cited us a statute and by his interpretation he claims that the county is liable for any damage to his cable caused from construction of the roads.

"The statute to which he referred is House Bill 474, 1961 Session, and I request that your office give us your opinion as to the validity of the bill and when and where applicable."

The title to Act 474 of the 1961 Regular Session of the Legislature reads as follows:

"An act providing for the relocation of utility facilities when necessitated by Federal-aid highway system projects; providing for the payment of the cost of such relocations by the State as highway construction costs upon Federal participation and Federal funds being actually collected by the State; prescribing the author-

ity of the State Highway Director in regard thereto; providing for the method of paying or reimbursing said utilities; and repealing all conflicting laws.”

Both Sections one and two of this Act provide for the issuance of relocation orders by the State Highway Director. Certain of the costs of relocation of utility facilities are to be paid by the State of Alabama, contingent upon Federal-aid participation. The only highway work affected by this Act is State Federal-aid construction.

It is, therefore, my opinion that Act 474 of the 1961 Regular Session of the Legislature applies only to utility relocations necessitated by State Federal-aid highway construction and does not apply to the counties of this State or to the county road construction program.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

October 24, 1963

Major General Alfred C. Harrison
The Adjutant General
State Military Department
Montgomery, Alabama

National Guard — Military Dept. — Words and Phrases.

1. A commissioned warrant officer of the Alabama National Guard is a commissioned officer for the purpose of receiving the exemption from the payment of the privilege license on motor vehicles as provided in Title 35, Section 101, Code of Alabama 1940, as Recompiled 1958.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of October 16, 1963, is as follows:

“1. Section 101, Title 35, Code of Alabama, 1940, as amended, (H. B. 162 — Quarles, 1935 Legislature) provides for the entitlement to the free exemption from motor vehicle license fees for commissioned officers of the active National Guard of Alabama and certain other individuals assigned as advisors to the Alabama National Guard by the Department of the Army.

"2. Since several inquiries have been received concerning the entitlement of warrant officers to the free exemption under the above referenced law, it is requested that an official opinion be rendered in the case of warrant officers."

Your question is whether or not warrant officers in the Alabama National Guard are entitled to the exemption from the payment of privilege license on motor vehicles as provided in Title 35, Section 101, Code of Alabama, as Recompiled 1958.

The answer to your question is in the affirmative. Title 35, Section 101, Code of Alabama 1940, as Recompiled 1958, provides in pertinent part as follows:

"* * * There shall be exempt from the operation of the privilege or license tax and registration fee now or hereafter to be levied on automobiles and motor vehicles within the state of Alabama, passenger vehicles owned and operated by * * * and all commissioned officers of the active national guard of Alabama. * * *

It will be noted that the exemption applies to all **commissioned** officers of the active National Guard of Alabama; therefore, the question is whether or not a warrant officer is included in the definition of a commissioned officer for the purposes of Title 35, Section 101, *supra*.

The Supreme Court of Alabama, in the case of **Glencoe Paving Co. v. Graves**, 266 Ala. 154, 94 So. 872, said:

"The construction placed on a statute by the officers authorized to construe and administer the law is entitled to favorable consideration * * *.

"And there is a strong presumption as to its correctness where such a construction has been followed for a long time."

I have been informed by authorities in the State Military Department that the warrant officers in the Army and Air National Guard have received the exemption from the payment of the privilege license tax on motor vehicles ever since the passage of Title 35, Section 101, Code of Alabama 1940, as Recompiled 1958, up until the present time.

Furthermore, I was supplied with a copy of a directive from the Department of Defense showing that Congress, in 1956, had defined a "commissioned officer" to include a commissioned warrant officer.

The State Military Department informed me, also, that all warrant officers in the Alabama National Guard are commissioned.

Therefore, in consideration of the administrative interpretation placed on the term "commissioned warrant officer" by the Department of Defense and the State Military Department, it is my opinion that a commissioned warrant officer in the active National Guard of Alabama comes within the definition of commissioned officer of the active National Guard, so as to be entitled to the exemption from the payment of privilege tax on motor vehicles in the State of Alabama, as provided for by Title 35, Section 101, *supra*.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 30, 1963

Honorable Wiley Hickman
Judge of Probate
Etowah County
Gadsden, Alabama

Beauty Shops — Probate Judges — Licenses — Statutes.

Judges of Probate have no responsibility for determining whether beauty shop operators have complied with Act No. 78, Acts of Alabama, Special Session 1961, pp. 1955-1975 (Title 46, §§ 64(38)-64(70), Code of Alabama 1940, Recompiled 1958, as amended) prior to issuing to them the business privilege licenses required by Title 51, § 473, Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Hall.

Dear Sir:

I have your letter of October 25, 1963, which is as follows:

"There are some interested people who feel that Section 32½ of Act 78 Regular Special Session 1961 places on the Judges of Probate who sell privilege licenses the responsibility to determine whether or not a beauty shop operator has complied with the cosmetology act before such person is sold a privilege or business license.

"I can see nothing in this law that places such responsibility on the Judge of Probate. Will you please analyze and advise your opinion as to whether he does or does not have the obligation to make

determination of qualification under the cosmetology act before he can issue the business license."

Section 32½ of Act 78, Special Session 1961 (now Title 46, § 64(70), Code of Alabama 1940, Recompiled 1958, as amended) deals with the method to be followed by certain counties in determining whether or not to come under the provisions of the Act, and the only duties placed on the Probate Judge by this section are those with regard to certification of the action, if any, taken by the county governing body.

I find nothing in the Act (now Title 46, §§ 64(38)-64(70), Code of Alabama 1940, Recompiled 1958 as amended) or in Title 51, §473, Code of Alabama 1940, Recompiled 1958, dealing with business privilege licenses of beauty parlors, etc., which requires Judges of Probate to determine whether beauty shop operators have complied with said Act No. 78 prior to issuing to them the business privilege licenses required by Title 51, § 473, Code of Alabama 1940, Recompiled 1958.

Act No. 78 is a regulatory statute with which the Probate Judge is not concerned. Title 51, § 473, is a revenue measure. In this connection, see opinion of this office dated March 6, 1963, addressed to Hon. Estes R. Flynt, Judge of Probate, Lauderdale County, Quarterly Report of Attorney General, Vol. 110, p. 50, and **Nelson v. Brown**, 242 Ala. 515, 7 So. 2d 572.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

October 30, 1963

Mrs. Sarah A. Reynolds
Judge of Probate
Macon County
Tuskegee, Alabama

Eminent Domain — Judges — Judges of Probate.

Judge of Probate acting within jurisdiction conferred upon court in eminent domain proceeding has no personal pecuniary liability for errors of fact or law made in dividing compensation among parties respondent.

Procedure for condemnation of land contained in Title 19, Code 1940, contemplates one proceeding from filing of petition for condemnation to final division of compensa-

tion among parties respondent.

Opinion by Assistant Attorney General Cage.

Dear Mrs. Reynolds:

I have your request for an opinion of this office dated October 11, 1963, which is as follows:

"Funds are deposited in the Fiduciary Account of the Probate Judge by virtue of awards in road condemnation cases. Normally the condemnation case sets out the defendants as well as can be ascertained and usually includes unknown heirs, etc. No allegation is made as to the interests of the defendants. The only questions in the basic condemnation case are the right to acquire the property and the amount therefor. The question as to who are the proper defendants or, in other words, who are the persons holding legal title, and their respective interests is not decided in the basic case but must be decided by the Probate Judge prior to the distribution of the money. I am aware that if a question of a determination of title is involved, the issue is transferred to the Equity Court. With the above in mind, my question is, 'If the Probate Judge acts under the provisions of either sections 26 of 27, Title 19, Code of Alabama of 1958, recompiled, with relation to a determination in the Probate Court, has he acted in sufficient judicial capacity so as to afford him immunity for any decree he might render establishing the legal owners and their interests as to such funds?' If your answer is in the affirmative, then, 'what would be the effect if such decree was based on false or incorrect testimony of an incorrect application of the law to the facts?' Also, if the procedure under sections 26 or 27 is proper, should the proceeding be separate or a part of the basic condemnation suit and if separate give some general information on the notice requirements.

"I regret the necessity for the several questions but this Court has several large sums to be disbursed hence the information is urgently needed."

Sections 26 and 27 of Title 19, Alabama Code 1940, 1958 Recompiled Edition, are as follows:

"§ 26. Distribution or apportionment of funds among parties or respondents.—Any one of the owners or parties alleged in the application to own or hold any claim, interest or title in the lands sought to be condemned, may, after the granting of the application, file with the court of probate his claim for his part or division of the award made by the commissioners; and upon the filing of such claim, and upon the payment by the applicant into court of such

award, the court shall set down for hearing the claim so filed by such party, and determine the same. Upon such determination, the court shall distribute the funds to each of the parties so entitled thereto in the sum and manner in which the facts disclosed upon the hearing show each of said parties to be so entitled.

"§ 27. Separate hearing for different parties or respondents provided for.—The court may, in the event no such claims are filed by any of such parties, and where the court is doubtful as to a proper division, require the parties in interest to propound their claims and to hear evidence upon the same in order that the court may determine to what part of proportion of said award each of said parties may be rightly entitled. No division or partition for distribution shall be made by the court of probate under this section when any adverse claim or title is asserted by any one of the interested parties, which involves the determination of the title to land; and the procedure for partition or distribution under this section shall follow as near as may be the manner provided for the partition of property in chapter 6 of Title 47; except that no parties in interest shall be added to those made defendants in the application to condemn, and the hearing shall be confined to such parties so named; and when any claim is denied by any party in interest, which involves the determination of the title to land, the probate court shall transmit to the equity division of the circuit court the said claims and denials filed in the probate court, and also the amount of the commissioners' award, less the proper court costs arising from the filing of such claims and denials; and the circuit court in equity shall proceed to determine the matter as now provided by law."

It is apparent that the monies paid into Probate Court may be apportioned among the parties in interest following a hearing had either upon a claim or claims voluntarily filed (Section 26, above) or, in default of such voluntary filing, upon claims propounded pursuant to court order (Section 27, above).

The rule that no judge is liable in a civil action for his judicial acts performed while acting within the limits of his jurisdiction is well established in Alabama. **Hamilton v. Williams**, 26 Ala. 527; **Busteed v. Parsons**, 54 Ala. 393; **Grider v. Tally**, 77 Ala. 422; **Early v. Fitzpatrick**, 161 Ala. 171, 49 So. 686; **Broom v. Douglas**, 175 Ala. 268, 57 So. 860; **Pickett v. Richardson**, 223 Ala. 683, 138 So. 274.

The power to hear evidence presented and to exercise discretion or judgment in applying the law to the facts of the case, such as that granted by the above-quoted sections, is the essence of judicial action. **Grider v. Tally**, 77 Ala. 422; **Pickett v. Richardson**, 223 Ala. 683, 138 So. 274.

It is, therefore, my opinion, that if the Probate Judge acts under the provisions of Sections 26 and 27, Title 19, Alabama Code 1940, 1958 Recompiled Edition, he has no individual civil liability for such action, even though his decree is based on false or incorrect testimony or an incorrect application of the law to the facts.

In reply to the third question contained in your request, this is to advise that the procedure for the condemnation of land contained in Title 19 of the Code contemplates one proceeding from the filing of the petition to condemn to the final division of the damages awarded for the property acquired by the condemnor. Following the entering of the order of condemnation and the payment of the compensation into court, the nature and validity of any claims filed pursuant to Sections 26 and 27, *supra*, is an issue between the parties respondent. **Williams v. Jefferson County**, 261 Ala. 76, 72 So. 2d 920; **State v. Howze**, 247 Ala. 564, 25 So. 2d 433.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

October 31, 1963

Hon. W. W. Weatherford
Judge of Probate and Chairman
Board of Revenue
Franklin County
Russellville, Alabama

Sheriffs — Expenses — Counties — Solicitors.

The sheriff, in making investigations, is entitled to be paid by the county for the expenses of a polygraph examiner when the county governing body considers the same reasonably necessary to the investigation of the crime.

Opinion by Assistant Attorney General Webb.

Dear Judge Weatherford:

I have received your letter of October 22, 1963, requesting official opinion as follows:

“Over a period of many months there has been acts of violence that have taken place at a Limestone quarry plant near Russellville.

Such acts of violences consisting of dynamiting building, equipment, etc., and reports of shooting at employees at this plant. On August 8, 1963 Honorable Bryce U. Graham, Circuit Solicitor of our judicial circuit, directed Honorable James Hovater, Sheriff of Franklin County, Alabama, in writing, to make a full and complete investigation of these reported acts of violences.

"In the course of the Sheriff's investigation, he caused a polygraph investigation to be made by Mr. Henry Butler of Tuscaloosa. The Sheriff has presented to the Board of Revenue the bill of Mr. Butler, the polygraph examiner, for two days work with polygraph, \$50.00, and personal expense and automobile mileage, \$15.00.

"We ask your official opinion on the question of whether or not the county is authorized to pay this claim of \$65.00."

Title 54, Section 9, Code of Alabama 1940, provides:

"The sheriffs in their respective counties whenever directed to do so in writing by such solicitors, or by the attorney general or governor, shall make special investigation of any alleged violation of the law in their counties, and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly, after its preparation, be presented to the official who directed the investigation and if such official be the governor or attorney general he may present it to any solicitor prosecuting criminal causes in the county. The sheriff of the county shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid."

Section 10 of Title 54, supra, provides, in pertinent part:

"The expense of such investigation when so ordered shall be paid from the county treasury, upon a warrant properly drawn; and after the report is made, the sheriff shall file with the board of revenue or court of county commissioners a detailed sworn statement of his expenses accompanied by the written approval of the officer directing the investigations, and the board of revenue or court of county commissioners shall audit and allow only so much thereof as it shall find reasonably necessary . . ."

In addition, the Legislature has provided in Act No. 593, Acts of Alabama 1949, page 925 (Title 54, Section 27(1), Code of Alabama Re-compiled 1958), in pertinent part, as follows:

"The county governing body of each of the several counties of the state may, in its discretion, and upon application of the sheriff of the county . . . pay for any services performed for the sheriff which are reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties."

This office has previously stated that obviously the Legislature could not properly itemize exact expenses that should be considered as reasonably necessary in the investigation of a particular case and what expenses should be considered as unnecessary. Quarterly Report of Attorney General, Vol. 83, page 37. The requirements of each case in developing an investigation differ widely and the requirements in each case must, therefore, be considered individually. It is my opinion that such a matter as a county governing body approving the sheriff's expenses under Act No. 593, *supra*, is something that directs itself to the sound discretion of the county governing body as to whether or not those expenses are reasonably necessary. This office in an opinion to Hon. William T. Seibels, under date of May 10, 1949, ruled that such expense for use of polygraphs may be paid pursuant to Title 54, Section 10, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 55, page 83.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

November 4, 1963

Honorable Earl D. James

Mayor

City of Montgomery

Montgomery, Alabama

Highways and Highway Department—Municipalities —
Motor Vehicles.

Traffic control on those city and town streets designated as municipal connecting link roads by the State Highway Department pursuant to Title 23 Sections 78(19) et. seq. Code, 1958 Recompiled Edition, is under joint city-state control.

Opinion by Assistant Attorney General Cage.

Dear Mr. James:

I have received your letter of October 17, 1963, in which you request my official opinion as follows:

"There are several streets in Montgomery which have been designated as State roads, so that they are maintained by the State of Alabama. To be specific, Carter Hill Road is a street in the City of Montgomery which is designated as a State maintained road. Since it is a State maintained road, my inquiry is:

"(1) Does the City of Montgomery have the authority to designate the mode of travel, i.e., truck routes, no trucks, one-way only, etc., along this street without consulting the State of Alabama?

"(2) If the answer to question number (1) is in the affirmative, can the City of Montgomery designate through its traffic control officers, without passing a City Ordinance, the particular kind or mode of travel that will be permitted by the City of Montgomery along this street?"

It is my understanding that the several streets in the City of Montgomery mentioned in your request have been designated municipal connecting link roads by the State Highway Department pursuant to the provisions of Title 23 Sections 78(19) et. seq., Alabama Code 1940, 1958 Recompiled Edition, and are under required State maintenance by virtue of such Code sections.

The Legislature, in dealing with municipal connecting link roads, provided in pertinent part as follows in Title 23, Sections 78(22) f and g of the Code:

"(f) Traffic control on a city or town street maintained in part by the state shall be under the joint control of the city and the state.

"(g) The establishing of speed zones and the placing of traffic lights shall be subject to joint approval of the city or town and the state officials . . . "

It is, of course, clear that the designation of truck routes, no trucks, one-way streets, etc, are controls upon traffic within the meaning of Title 23 Section 78(22)(g), *supra*. Traffic control on such streets is therefore under joint city-state jurisdiction.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

November 5, 1963

Honorable J. Marvin Greer
Tax Collector, Tallapoosa County
County Court House
Dadeville, Alabama

Ad Valorem Taxes — Motor Vehicles — Exemptions —
Veterans.

1. Act No. 576 of the 1963 Session of the Alabama Legislature, approved September 16, 1963, effective October 1, 1963, and Title 51, Section 717(1), Code of Alabama, Recompiled 1958, are two distinctive statutes, both having a separate field of operation and independent of each other.

2. Act No. 576, supra, provides for those disabled veterans who can meet its requirements a distinctive license plate which can be procured for the motor vehicles of such veterans which are equipped with special mechanical control devices without such veterans paying the regular license tax and for a \$1.00 issuance fee. No exemption is given under this Act from the ad valorem tax.

3. In order for a disabled veteran who is qualified under Act No. 576, supra, for the distinctive license tag, to also be entitled to an ad valorem tax exemption on his specially equipped vehicle, he must, independently of Act No. 576, also qualify under Section 717(1), supra, and meet the prescribed conditions of that statute.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of October 21, 1963, is as follows:

"I would like to get your ruling on the following law:

"A service connected veteran that is one hundred per cent disabled and has to use special equipment to enable him to drive his car is exempt under Title 51, Section 717(1) of the Code of Alabama from ad valorem tax and tag on his car providing the Federal Government paid for part of said car. Under a new law passed this year by the State Legislature a disabled veteran has to use special equipment on his car to get a special tag from the State of Alabama—But? he has to pay the ad valorem tax under this new law to get this special tag.

"The question in my mind is this: If he is exempt from all taxes under Title 51, Section 717, why is he not exempt from all ad valorem taxes under this new law."

Before answering your question it is necessary to consider the applicable provisions of both Act No. 576 of the 1963 Alabama Legislature, approved September 16, 1963, and effective October 1, 1963, and Title 51, Section 717(1), Code of Alabama, Recompiled 1958.

Section 1, of Act No. 576, supra, is quoted as follows:

"Any veteran as defined in Code of Alabama 1940, Title 60, Section 53, as amended, who is a resident of this state and who is suffering a physical disability which requires that any motor vehicle he operates be equipped with special mechanical control devices, upon application accompanied by such proof of eligibility for the special license plates provided herein as may be prescribed by the state department of revenue, and upon payment of one dollar, shall be issued license plates, as provided by law, for private of pleasure motor vehicles, upon which, in lieu of the number now prescribed by law shall be inscribed in legible letters the words, 'Disabled Veterans,' and an identifying number as prescribed by the state department of revenue. Such plates shall not be transferable. The fee of one dollar paid therefor shall be in lieu of the regular license fee now required by law for motor vehicles and shall be used to defray the cost of issuing the distinctive license plates." (Emphasis supplied)

In pertinent part Section 717(1), supra, provides as follows:

"Any disabled veteran of World War II or of any other hostilities in which the United States was, is or shall be engaged against any foreign state, whether as a result of a declared war or not, who owns an automobile which has been, is or shall hereafter be all or partly paid for with funds furnished for such purpose by the administrator of veterans' affairs under authority of any act of the congress of the United States, is exempt from all license fees and ad valorem taxes required by or prescribed in article 8 of chapter 20, Title 51 of the 1940 Code of Alabama, provided the veteran keeps such motor vehicle only for private use." (Emphasis supplied)

A comparison of the two statutes shows that they are different and they require different conditions to be met in order for a disabled veteran to be entitled to their respective benefits. Act No. 576, supra, provides that its provisions are to be supplemental to those of the motor vehicle license tax laws. Act No. 576, then is a distinctive and independent law from Section 717(1), and it has a different field of operation. Moreover, the intent of these two statutes is made very clear by their very language.

Act No. 576 gives to disabled veterans who meet its requirements, and who have specially equipped motor vehicles with mechanical control devices, the right to procure a distinctive type of license plate. This special license plate, with the words "disabled veterans" superimposed thereon, can be obtained by disabled veterans who qualify therefor without the payment of the license tax and by paying a one dollar fee to defray the cost of issuing this special plate. No exemption is given under this Act from the ad valorem tax.

In order to be entitled to the ad valorem tax exemption, the disabled veteran must qualify under Section 717(1), supra. That statute gives the disabled veterans who can meet its requirements the right to procure for their motor vehicles a regular license plate without paying either the license tax or the ad valorem tax on such vehicles, and without any charge being made for issuing the license plate, provided that the motor vehicles involved have been paid for in whole or in part by funds which have been furnished by the Veterans Administration.

A disabled veteran who can qualify or meet the conditions only of Act No. 576, supra, without also being qualified under Section 717(1), then would not be entitled to an exemption from the ad valorem tax. However, a disabled veteran who can qualify under both of these statutes would not lose the ad valorem tax exemption under Section 717(1), if he elects to procure the special tag under Act No. 576, but in doing so he must pay the one dollar issuance fee required for the special tag. He would, under such circumstances, certainly still be entitled to the ad valorem tax exemption as a qualified veteran under Section 717(1).

Your question is answered accordingly.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

November 6, 1963*

Mr. E. W. Lee
Tax Assessor, Pickens County
Pickens County Court House
Carrollton, Alabama

Ad Valorem Taxes — Licenses — Trailers.

Where a house trailer is first used as a motor vehicle in October of 1963, and was assessed for the previous year as a part of the real estate, owner must purchase an identi-

fication tag or plate for such trailer under the provisions of Act No. 44, Special Session 1961 (Section 704(1), et seq., Title 51, Code of Alabama, Recompiled 1958), as amended by Act No. 159 Special Session 1962, but will not owe ad valorem taxes on the trailer as a motor vehicle for the preceding tax year October 1, 1962 through September 30, 1963.

Opinion by Assistant Attorney General Loeb.

Dear Mr. Lee:

Your request for an official opinion bearing date of August 23, 1963,* is as follows:

"I have a resident of this county who has a house trailer which he assessed on his lot on Oct. 14 1962 as realty. The taxes on this will be due October 1, 1963 which he will pay.

"During the month of October he will be moving this trailer and will have to purchase a tag for it. When I make the assessment for him to purchase the tag I am of the opinion that he will not owe any tax on it as motor vehicles are assessed for the preceding year.

"I would appreciate your ruling or opinion at your earliest convenience."

According to the facts contained in your request, the owner of the house trailer has already assessed such trailer as part of his real estate for the tax year 1962-63, and will pay the ad valorem taxes when they become due on October 1, 1963. Since he will be moving the trailer off his lot in October, 1963, and such trailer will be used as a motor vehicle on the highways of the State, he must pay the annual registration fee of \$3.00 as levied under Act No. 44, Acts of Alabama, Special Session 1961, Vol. II, p. 1897 (Section 704(1), et seq., Title 51, Code of Alabama, Recompiled 1958), as amended by Act No. 159, Acts of Alabama, Special Session 1962, p. 203. See official opinion of this office rendered September 24, 1962, to Hon. Arnold D. Debrow, Tax Assessor, Mobile County. As a prerequisite to payment of such registration fee, he must assess the trailer for ad valorem taxes in accordance with Act No. 44, supra, as amended by Act No. 159, supra, on the same basis and in the same manner that ad valorem taxes on motor vehicles are assessed. Under Section 704, as amended Title 51, Code of Alabama 1940, such ad valorem taxes are collected a year in arrears, that is, for the preceding tax year. When, therefore, the owner of the trailer comes in to pay the registration fee, and you assess the trailer for ad valorem tax purposes, he will owe no ad valorem taxes on the trailer as a motor vehicle for

the preceding year October 1, 1962 through September 30, 1963, since the trailer is subject to ad valorem tax as a part of the real estate for the tax year 1962-63 and was not used as a motor vehicle during such preceding tax year. This is expressly provided for under the wording of Section 1 of Act No. 159, supra.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

*NOTE: An opinion responding—and to the same effect as the above opinion—to Mr. Lee's request of 23 August 1963 was released on 10 September 1963. Thereafter, the writer of both the mentioned opinions to Mr. Lee discovered the opinion of 24 September 1962 to Mr. DeBrow, which inadvertently had been omitted from Vol. 108 of the published Quarterly Reports of the Attorney General and, consequently, was not indexed. At the special instance and request of the Department of Revenue, the Lee opinion was rewritten so as to include reference to the DeBrow opinion, and the latter was included as the immediately following opinion in this volume of the Quarterly Report.

September 24, 1962*

Honorable Arnold D. DeBrow
Mobile County Tax Assessor
Mobile, Alabama

Ad Valorem Taxes — House Trailers.

1. Act No. 44 of the 1961 Session of the Alabama Legislature (Acts of Alabama 1961, Vol. II, page 1897), as amended by Act No. 159 of the 1962 Session, approved July 16, 1962, and effective October 1, 1962, has broadened the scope of Act No. 44 to now include all house trailers, regardless of whether used on the highways during the tax year, except those which have become affixed to and a part of the real estate, and those which constitute a part of the stock of a dealer.

2. Under Act No. 44, as so amended, supra, and effective October 1, 1962, it is the duty of the License Commissioner of Mobile County in addition to registering house trailers and collecting the fees therefor, to also assess and collect the ad valorem tax on all such trailers, except those which are affixed to and have become a part of the real estate, and those which constitute a part of the stock of a dealer.

3. Under Act No. 44, as amended, and effective as of October 1, 1962, it will be the duty of the County Tax Assessor of Mobile County to assess only those house trailers which have become affixed to and a part of the realty.

4. The opinion of this office reported in Quarterly Report of the Attorney General, Vol. 105, page 7, is modified to the extent of being made applicable only to Act No. 44, supra, as originally enacted, and not to the Act as amended by Act No. 159, supra, effective October 1, 1962.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of August 27, 1962, is as follows:

"Act number 44, 1961 session legislature was intended to provide for licensing of house trailers with the assessment and collection of tax on them to be handled in the same manner as the licensing, assessing and tax of automobiles. This act was subsequently rendered impotent by an Attorney General's opinion which held substantially, 'that the law applied to automobiles, their tags and tax etc., was only applicable when such vehicles were using public roads and highways.' This meant that house trailers that were not actually traveling the highways were not affected by the law that was passed.

"At the 1962 special session of the legislature act number 159 was enacted which removed the place to be issued to house trailers from the classification of license tags and legally referred to them as identification plates or tags. It further provided the conditions that, all ad valorem tax due on such a trailer must have been paid before the issuance of the identification plate. The bill also specified that the assessing and collecting of tax and the issuance of the identification tag would be handled in the same manner as the assessing, collecting and licensing of automobiles.

"My question of law is this: In Mobile County the licensing of automobiles along with the assessing and collecting of tax due thereon is handled by the Mobile County Commissioner of License. According to the act as finally amended is it the duty of the Commissioner of License to assess and collect the tax at the same time he issues the identification tag, or is it to be legally construed that the Tax Assessor should make the assessment, the Tax Collector the collection of taxes and the License Commissioner only to issue the identification tag.

"Since there is only five weeks left in which to settle this point of law and in turn to set up the necessary administrative procedure for handling this matter, I am sure that you realize that time is of the essence. Any special priority that you can give this matter is urgently requested and desperately needed."

In addition to your letter I have had the advantage of information furnished in a letter and memorandum to this office from the Honorable George A. Toulmin, License Commissioner, Mobile County, wherein he has been most helpful in outlining and referring to several Acts which he believed to be pertinent, including the Act (General Acts of Alabama 1945, page 367 creating the Office of Commissioner of Licenses for Mobile County, and the later Act (Acts of Alabama 1961, Vol. II, page 2265) creating the Office of License Commissioner for Mobile County.

Under these Acts it is not only clearly the duty of the License Commissioner to collect the license taxes and registration fees on motor vehicles, but it is also his duty to assess all motor vehicles used on the highways for ad valorem taxation, and to also collect this tax, where due, on such motor vehicles before issuing the license tags. In other words, the License Commissioner in Mobile County has under these Acts been charged with the assessment and collection of ad valorem taxes on all motor vehicles used on the highways, in lieu of the Tax Assessor and Tax Collector.

The statute under consideration, Act No. 159 of the 1962 Session of the Alabama Legislature, approved July 16, 1962, and effective for the first time on October 1, 1962, does not repeal Act No. 44 of the 1961 Session (Acts of Alabama 1961, Vol. II, page 1897), but amends its title and also Sections 1 and 2. However, these amendments are material ones and serve to considerably broaden the scope of Act No. 44, *supra*.

When these Acts are read together it is very evident that the legislature has set up a special procedure for the registration of house trailers and the collection of registration fees, and the assessment and collection of ad valorem taxes on such trailers. It is also made very clear by the language of these Acts that house trailers are to be treated in a special way insofar as registrations and the assessments and collection of ad valorem taxes are concerned, and that the specific procedure so prescribed is to take precedence over other laws treating house trailers in a general way with other property. Moreover, the well established rule of construction is that such special laws dealing with a subject in a specific way are to supersede laws of a general application which relate to the same subject in a general way.

State v. Elliott, 246 Ala. 439, 21 So. 2d 310

Downing v. City of Russellville, 241 Ala. 494, 3 So.2d 310

Herring v. Griffin, 211 Ala. 225, 100 So. 202

The assessment and collection of ad valorem taxes on house trailers then is to be done in the way and under the procedure as is prescribed in Act No. 44, supra, as amended by Act No. 159, supra, which is said to repeal all laws in conflict therewith.

The amendment extends Section 1 of the Act so that it now includes all house trailers, **"except a house trailer which has been assessed for ad valorem taxation as a part of the realty . . .,"** and those which constitute a part of the stock of a dealer. Therefore, as so amended the provisions of Act No. 44, supra, now have been broadened to the extent of including all house trailers within its scope, except those which have become a part of the real estate, and those in a dealer's stock.

The official opinion of this office referred to by Mr. Toulmin in his letter as being addressed to the Honorable John A. Sankey, Judge of Probate of Montgomery County, dated November 7, 1961, and reported in Quarterly Report of the Attorney General, Vol. 105, page 7, which held Act No. 44 as originally enacted, supra, to apply only to house trailers used on the highways during the tax year, is not applicable to said Act as amended. The 1962 amendment changes both the language and meaning of the Act in this respect. Thus, the Sankey opinion would apply only to Act No. 44 as originally enacted and not to the Act as amended by Act No. 159, effective as of October 1, 1962.

Pertinent changes made in the Title to Act No. 44, supra, by the amendment are indicated as follows:

"An Act relating to house trailers; providing for registration of certain house trailers in this state; providing for the collection and distribution of the registration fee and the issuance of identification tags for use on house trailers registered hereunder, all in the same manner and subject to the same requirement of prior assessment and payment of ad valorem taxes as applies to the collection and distribution of motor vehicle licenses and the issuance of motor vehicle license tags; prescribing penalties; providing for the enforcement of this Act; and exempting house trailers forming a part of a dealer's stock from ad valorem taxation." (Emphasis supplied)

Material changes made by the amendment in Section 1 of Act No. 44, supra, are emphasized in the following excerpts taken from that Section:

"The owner of any house trailer who fails to pay the registration fee hereby provided for or who fails to display the identification tag on such trailer, as hereinabove required, shall be subject to

the same penalties prescribed by law for a like offense relative to the payment of motor vehicle license taxes and the affixing of motor vehicle license tags; and this Act shall be enforced by the same officers, under the same conditions and through the same procedures that laws relative to the issuance and display of motor vehicle license tags are, except that failure to comply with this Act shall constitute an offense whether the house trailer is or is not used or operated on the roads or highways of the state." (Emphasis supplied)

These provisions of Act No. 44, as amended, being considered together with the provisions of said Acts creating the Office of License Commissioner for Mobile County, and prescribing the duties of that office, clearly appear, effective as of October 1, 1962, to charge the License Commissioner of Mobile County with the assessments and collection of ad valorem taxes, as well as the collection of registration fees, on all house trailers, "except a house trailer which has been assessed for ad valorem taxation as a part of the realty," and those which would constitute a part of the stock of a dealer. This would include all house trailers, regardless of whether they are used on the highways during the tax year, which constitutes personal property and which have not been affixed to and become a part of the real estate, except those in a dealer's stock.

Very truly yours,

MacDONALD GALLION
Attorney General

*See note to preceding opinion.

November 12, 1963

Board of Trustees
Department of Archives and History
State of Alabama
Montgomery, Alabama

Officers and Offices — Archives and History —
Compensation.

The Director of the Department of Archives and History is not a State officer within the meaning of Section 281, Constitution of Alabama 1901 or Amendment XCII (92) thereto, known as the "Boutwell Amendment;" and his compensation may be increased during the term for which he was elected.

Opinion by Assistant Attorney General Screws.

Dear Sirs:

Your request for an official opinion bearing date of November 4, 1963, is as follows:

"The General Session of the Legislature for 1963 passed Act No. 268, which was approved August 23, 1963, and which provided among other things that the salary of the Director of the Department of Archives and History should be at a sum not exceeding \$10,500. The Executive Committee of the Board of Trustees adopted the following resolution on November 1, 1963:

"Be it resolved that the salary of the Director of the Department of Archives and History be \$10,500 per annum from this day, as provided in Act No. 268 as passed by the 1963 General Session of the Legislature, approved August 23, 1963.'

"Please advise us

"First, whether this increase in salary is in anyway prohibited by Amendment 92 to the Constitution of Alabama;

"Second, whether there is any reason why this increase for the Director of the Archives and History Department should not take effect as of November 1, 1963."

I am of the opinion that both your inquiries should be answered in the negative.

The Director of the Department of Archives and History is elected by its Board of Trustees of which board he is the secretary for a term of six years and until his successor is elected and qualified.—Title 55, Sections 259-260, Code of Alabama 1940, Recompiled 1958. I am informed that said Director's present term of office began March 1, 1961. He is required to take an oath of office as other public officials, and shall be commissioned in like manner—Title 55, Section 261, Code of Alabama 1940, Recompiled 1958.

His powers, functions and duties are set forth in Title 55, Section 262, Code of Alabama 1940, Recompiled 1958, which provides as follows:

"The powers, functions and duties of the director of the department of archives and history shall be as follows: To control and direct the work and operations of the department of archives and history.

To administer the state official archives. To prepare the Alabama official and statistical register. To diffuse knowledge in reference to the history and resources of the state. To administer all military records for historical purposes. To administer the state's historical library and to collect and administer historical portraits and museums. To serve as secretary of the capitol building commission and the Alabama memorial commission. To be a member of the Alabama pension commission. To collect, organize and preserve non-current county records for historical purposes. To edit the Alabama historical quarterly and other historical publications. To distribute state official reports. To designate and describe historic spots in Alabama for monumental purposes. To perform all duties necessary in connection with the administration of the public library service division. To have custody and supervision, under the direction of the director of finance, of the Alabama memorial building. To perform any and all other powers, functions and duties as may now or hereafter be placed upon the director of the department of archives and history."

The question presented is whether said Director is an officer within the meaning of Section 281, Constitution of Alabama 1901 or Amendment XCII (92) thereto, known as the "Boutwell Amendment," both of which prohibit the increase or decrease of the compensation of certain State officers during the term for which they are elected or appointed.

A "public official" usually means a person who, by lawful authority, has been invested with a part of the sovereign functions of government and sometimes a person so invested has become an officer of a board or institution rather than of the state so as to be unaffected by the provision of the constitution that the salary, fees or compensation of any officer shall not be increased or diminished during the term for which he shall be elected or appointed.—*State v. Baumhauer*, 244 Ala. 1, 12 So. 2d 326. *State v. Sanders*, 187 Ala. 79, 65 So. 378. See *Hard v. Ex rel Baker*, 228 Ala. 517, 154 So. 77.

In my opinion the performance of the duties of the Director, as set forth in Title 55, Section 262, *supra*, do not amount to an exercise of the sovereign powers of the State. He is secretary of the Board performing ministerial duties. Even assuming for the sake of argument that sovereign powers are exercised, yet in my judgment the said Director would be an officer of the Board of Trustees of the Department of Archives and History and not an officer of the State within the meaning of the two constitutional provisions above noted.

The present increase in compensation may become effective November 1, 1963 in accordance with the resolution set forth in your letter.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

November 15, 1963

Mr. Albert L. Graham, Chairman
Board of Registrars of Autauga County
Prattville, Alabama

Elections — Board of Registrars — Voters — Registration —
Notice.

Act No. 577, Regular Session 1959, p. 1455 (Title 17, Section 26(1), Code of Alabama 1940, Recompiled 1958, as amended) authorizes any county Board of Registrars which is not furnished clerical assistance, in its discretion, after public notice has been given, to reserve any regular meeting day for the purpose of performing necessary clerical work, provided not more than twelve days may be reserved for clerical work in any calendar year, and the Board may decline to receive applications for registration on the days so reserved.

Opinion by Assistant Attorney General Hall.

Dear Sir:

Reference is made to your letter of November 4, 1963, which is as follows:

"Please give us a ruling on the following:

"Please explain fully. If the Board of Registrars of Autauga County, can work the 12 days, for clerical time in Act No. 577, in the 1959 Legislature."

Act No. 577, Acts of Alabama, Regular Session 1959, p. 1455, is now codified as Title 17, Section 26(1), Code of Alabama 1940, Recompiled 1958, as amended, reads as follows:

"Meeting for purpose of performing necessary clerical work.— Any county board of registrars which is not furnished clerical assistance may, in its discretion, after public notice has been given, decline to receive applications for registration on any day it meets, which day it reserves for the purpose of performing necessary clerical work, provided that not more than twelve days may be reserved for clerical work in any calendar year."

In my opinion this Act authorizes any county Board of Registrars which is not furnished clerical assistance, in its discretion, after public notice has been given, to reserve any regular meeting day for the purpose of performing necessary clerical work, provided not more than twelve days may be reserved for clerical work in any calendar year,

and the Board may decline to receive applications for registration on the days so reserved.

You will note that before any regular meeting day can be reserved for performing necessary clerical work, when the receipt of applications for registration may be declined, public notice of such intention is required. This may be accomplished either by posting or publication of such notice or both. Title 17, Section 37, of the Code provides that the cost of the publication of the notices required to be given by the registrars shall be paid by the State, the bills therefor to be rendered to the director of finance and approved by him.

Your attention is invited to the provisions of Title 7, Section 713, of the Code as to newspapers in which notices may be published.

Your attention is further invited to the fact that the Board may not reserve more than twelve days in any calendar year for such clerical work [Title 17, Section 26(1)].

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

November 18, 1963

Honorable Estes R. Flynt
Judge of Probate
Lauderdale County
Florence, Alabama

License Tags — National Guard

A member of the National Guard who owns a passenger vehicle and a pick-up truck is entitled to a distinctive plate or tag for the pick-up truck, under the provisions of Act No. 308, General Acts 1955, page 707, as amended by Act No. 253, General Acts 1959, page 816, upon the payment of the regular truck license required under the provisions of Title 51, Section 697, Code of Alabama, Recom-piled 1958.

Opinion by Assistant Attorney General Livingston.

Dear Judge Flynt:

Your request for an official opinion bearing date of November 6, 1963 is as follows:

"Is a member of the National Guard or Air National Guard of Alabama entitled to purchase a distinctive plate or tag at \$3.75 for a pick-up truck three-fourths of a ton capacity if he is the owner of a passenger vehicle?

"I respectfully call your attention to Act No. 775, Regular Session 1953, Alabama Legislature, Section 1. Any other provisions of law to the contrary notwithstanding the license and registration fee on motor vehicles designated as motor trucks which have a box or express type body of three-fourths of a ton capacity or less, and commonly known as 'pick-ups' or 'pick-up trucks' shall be Three Dollars (\$3.00). Provided, however, any applicant for such motor vehicle license shall, upon making application for same, execute, under oath, a statement in writing to the officer issuing such license reciting that such applicant is the owner of the vehicle and that such vehicle is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides.

"I also call your attention to Act No. 308, Regular Session 1955, Alabama Legislature, Section 2, which states in part. The distinctive license plates or tags so issued shall be used only upon and for personally-owned, private, passenger vehicles (to include station wagons and pick-up trucks) registered in the name of the member of the National Guard and Air National Guard making application therefor, and when so issued to such applicant shall be used upon the vehicle for which issued in lieu of the standard license plates or license tags normally issued for such vehicles."

The applicable statutes are referred to in your inquiry except that Act No. 308, Regular Session 1955, was amended in 1959 by Act No. 253, page 816, deleting the requirement for an additional payment of \$1.00 for a distinctive plate or tag. See Title 36, Sections 75(12) and 75(13), Code of Alabama Recompiled 1958. Act No. 775, General Acts 1953, page 1046, is codified in Title 51, Section 693 (2), Code of Alabama Recompiled 1958.

Your specific question is answered in the negative.

Section 2, Act No. 308, as amended by Act No. 253, supra, provides in part, as follows:

"The distinctive license plates here provided for shall be prepared by the commissioner or revenue and shall be issued through the judge of probate or license commissioner of the several counties of the state in like manner as are other motor vehicle license plates or tags and such officers shall be entitled to their regular fees for such service. Applicants for such distinctive plates shall present

to the issuing official proof of their membership in the national guard or air national guard of Alabama by means of certificate signed by the commanding officer of such applicant on forms prescribed by the adjutant general of Alabama. **Such applicant shall pay to the issuing official the regular license tax prescribed by law.**

The distinctive license plates or tags so issued shall be used only upon and for personally-owned, private, passenger vehicles (to include station wagons and pick-up trucks) registered in the name of the member of the national guard and air national guard making application therefor, and when so issued to such applicant shall be used upon the vehicle for which issued in lieu of the standard license plates or license tags normally issued for such vehicle." (Emphasis added)

It shall be noted that the above statute provides that the distinctive plates or tags so issued shall be used upon the vehicle for which issued in lieu of the standard license plates or tags normally issued for such vehicle and that the regular license tax prescribed by law shall be paid. Under the facts presented in your inquiry, if the member of the National Guard is the owner of a passenger vehicle in such condition as to be used for transportation other than the truck, he therefore, under Act No. 775, supra, would not be entitled to purchase a license for his pick-up truck for \$3.75. Under such circumstances, the standard license plate would be the regular truck license specified under the provisions of Title 51, Section 697, Code of Alabama Recompiled 1958.

Therefore, it is my opinion that the member of the National Guard referred to would not be entitled to purchase a distinctive plate or tag or the standard license plate or tag for his pick-up truck for \$3.75. He will be required to pay the amount specified in Section 697, supra, which is \$15.00. This office has previously ruled on the purchase of \$3.00 tag on pick-up trucks. Quarterly Report, Attorney General, Volume 73, page 41 and Quarterly Report, Attorney General, Volume 81, page 7.

In view of the provisions of Section 2, Act No. 308, as amended by Act No. 253, supra, that the regular license tax shall be paid, that passenger vehicles include pick-up trucks, and that the distinctive plates or tags shall be used upon the vehicle for which issued in lieu of the standard license plates or tags normally issued for such vehicle, it is my opinion that the member of the National Guard referred to and under the facts stated would be entitled to a distinctive tag for his pick-up truck upon the payment of the regular license specified in Title 51, Section 697, Code of Alabama Recompiled 1958.

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

November 19, 1963

Honorable W. Cecil Johnson
Judge of Probate, Clarke County
Grove Hill, Alabama

Solicitors — Expenses — Constitutionality.

Act No. 99, H. 203, approved June 27, 1963, providing for an expense allowance for the Solicitor of the First Judicial Circuit, is not a special, private, or local law requiring advertising within the purview of Section 106, Constitution of Alabama 1901. Said Act does not come within the inhibition of Section 68, Section 281, or Amendment XCII[92] of said Constitution, as the provisions thereof do not constitute an increase in the compensation of said officer during the term for which he was appointed or elected.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of November 13, 1963, is as follows:

"At the Regular Session, 1963 of the Alabama Legislature, Act No. 99, House Bill No. 302, by Wood, Doggett and McCorquodale, was passed, which stated:

" 'Section 1. In addition to all other salary, compensation and allowances prescribed for him by law, the circuit solicitor of the First Judicial Circuit shall be entitled to receive a monthly allowance of one hundred dollars (\$100) for payment of expenses incurred in the performance of any of his official duties. The allowance shall be paid in equal parts by the counties composing the First Judicial Circuit out of any funds in the county treasury not otherwise appropriated.' "

"In the opinion of the County Attorney, Hon. John E. Adams, this bill was a local bill which had not been advertised as required by law and therefore was not a good bill. It was the unanimous decision of the Commissioners' Court to take the advice of the County Attorney.

"Will thank you to give us an official opinion on this matter at your earliest convenience."

I am of the opinion that Act No. 99, H. 203, approved June 27, 1963, is constitutional and valid.

Our Supreme Court in an advisory opinion he'd that a bill applicable to a specific judicial circuit of Alabama which proposes to increase the salary of the judge of said existing circuit and to create an additional judge for such circuit is not a special, private, or local law, and, therefore, Section 106, Constitution of Alabama 1901, requiring advertising, has no application.—Opinion of the Justices, 252 Ala. 543, 41 So. 2d 907. This principle is applicable to the Act under consideration which relates to an expense allowance for the solicitor of the First Judicial Circuit.

I am, therefore, of the opinion that said Act No. 99, *supra*, is not violative of Section 106, Constitution of Alabama 1901, *supra*.

In an opinion of this office rendered to Honorable John T. Black, Solicitor, Ninth Judicial Circuit, dated October 11, 1963 (Ms.), it was held that an act providing for an increase in, or addition to, an existing expense allowance for the solicitor of the Ninth Judicial Circuit does not come within the inhibition of Section 68, Section 281, or Amendment XCII (92) of the Constitution of Alabama 1901. In said opinion it was observed:

"A flat expense allowance, if based on a reimbursement to the officer concerned for expenses incurred by him in the performance of his official duties and bearing a reasonable and substantially accurate relationship to the actual expenses incurred, is not considered as an increase in compensation and may be given to said officer during his term.—Quarterly Report of Attorney General, Volume 81, page 43; letter to Honorable Sim L. Howell, Chairman, Board of Revenue and Control, Morgan County, Alabama, dated October 13, 1955. This is likewise true as to an increase in an expense allowance already existing."

Said Act No. 99, *supra*, under present consideration, falls squarely within the rule above enunciated.

The premises considered, it is my opinion that the act in question, Act No. 99, *supra*, is not violative of any of the aforementioned constitutional provisions. I am not cognizant of any other provisions of our State Constitution that said act would violate.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

November 20, 1963

Honorable O. H. Florence
Register
Tenth Judicial Circuit of Alabama
Equity Division
225 Courthouse
Birmingham 3, Alabama

Costs and Fees — State and State Departments —
Executions.

State is authorized to pay certain court costs where
it is successful plaintiff and execution against de-
fendant is returned "no property found."

Opinion by Assistant Attorney General Bridges.

Dear Sir:

Your request for an official opinion is as follows:

"Title 7, Section 292, 1940 Code of Alabama, provides that the State may bring suit in equity matters 'and the suit is governed by the same rules as suits between individuals.' Title 7, Section 332 provides that equity shall adapt common law writs. Title 7, Section 518 provides that when execution against a defendant has been returned 'no property found,' execution may issue against plaintiff for costs created by him.

"I desire an opinion on the following:

"Considering the quoted wording from Title 7, Section 292, in cases where the State of Alabama is the complainant, is the State of Alabama obligated to pay costs created by it as provided in Title 7, Section 518, when costs are taxed against the respondent?"

It is my opinion that the State of Alabama is authorized to pay costs created by it where the State is a successful plaintiff and an execution for costs issued against the defendant has been returned "no property found."

The procedure for collecting from a successful plaintiff costs created by him is found in Title 7, Section 518, Code of Alabama 1940, Recompiled 1958, which provides:

"When execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of

the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

It is considered general doctrine needing no statutory sanction that the land and property of the State is not subject to seizure under execution in the absence of a statute granting such rights. It has been said that as a matter of public policy general statutory provisions making property subject to execution are construed to apply only to the property of private persons and corporations and not to that of public corporations or bodies politic. 33 C.J.S., Executions, Section 35 and many cases there cited.

In an opinion addressed to your predecessor and found in Quarterly Report of Attorney General, Vol. 19, p. 129-133, it was held that the State may properly pay court costs created by it where execution has been issued against the defendant and returned "no property found." The pertinent part of that opinion is as follows:

"You further state that in nine of these cases the costs of court were taxed against the respondent or respondents, for which execution issued, being returned 'no property found.' I wish to refer you to Section 6518 of the Code of Alabama, 1923 (now Section 292 of Title 7, Code of Alabama 1940, Recompiled 1958), which provides as follows:

"'6518. State may bring suit in circuit court.—The state may sue in the circuit court in chancery or equity matters, and the suit is governed by the same rules as suits between individuals. The solicitors of the circuit in which the suit is pending must attend to the same on the part of the state, and the governor may employ assistant counsel, if he deem it necessary and the circuit judge may determine the amount of compensation; and if unsuccessful, the state is liable for costs as individual suitors are. The direction of the executive of the state in writing is sufficient authority to the attorney for bringing such suit.'

"I wish to further refer you to Sections 7263 and 7805 of the Code of Alabama, 1923 (now Section 7 of Title 11 and Section 518 of Title 7, respectively, Code of Alabama 1940, Recompiled 1958), which provide, as pertinent, as follows:

"'7263. When execution against plaintiff for his own costs; penalty for failure to collect, etc.—The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the

cases was brought, may issue execution against the plaintiff, or against the plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant but for none other, to be collected may be rendered on motion in the circuit court of such county, in the name of the clerk or judge of probate issuing the execution, against the sheriff or his sureties, or either of them, upon three day's notice, for dereliction of duty on the part of the sheriff for failing to return, levy, or collect such execution so sued against the plaintiff or against the plaintiff and his sureties for such costs, as follows: . . .'

"7805. When against plaintiff for his costs.—When execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment.'

"In my opinion, sufficient authority exists under the above quoted statutes to authorize payment of that part of the costs which arose at the instance of the State in each of the cases where execution has been issued against the respondent and returned 'no property found.'"

Although it is my conclusion that Section 518, *supra*, may not be used as a basis for holding that the State is obligated to pay the costs it has created as a plaintiff when such costs have been taxed against the defendant and execution has been returned "no property found," I believe that the State is authorized to pay costs created by it under such circumstances where there is an appropriate order of the court.

Your question specifically asks whether the State is obligated to pay court costs under the particular circumstances set forth therein.

Apparently it makes little difference whether the State is **obligated** or **authorized** to pay such costs; as a practical matter these costs are paid by the State upon presentation of a proper cost bill.

Although this office is inclined to hold that the State is obligated to pay the costs referred to in your request, it hesitates to do so where such a holding would grant a right to collect such costs without affording any legal procedure for enforcing the payment thereof; thus creating a right without a remedy.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

November 27, 1963

Hon. J. S. Tarwater
Superintendent
Alabama State Hospitals
Tuscaloosa, Alabama

Alabama State Hospitals — Funds — Appropriations.

1. The fees, receipts, and income of the Alabama State Hospitals do not come within the purview of Title 55, Article 3, Chapter 4, Code of Alabama 1940.

2. All fees, receipts, and income of the Alabama State Hospitals may be expended for the support, maintenance and repair of the Alabama State Hospitals in the manner found to be most expedient by the Board of Trustees of such institutions.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 29, 1963, is as follows:

“Section 104 of Title 55 of the 1940 Code of Alabama reads as follows:

“§104. Lapsing of appropriations.—All unencumbered balances of all appropriations shall revert to the state treasury at the end of each fiscal year and to the credit of the general fund or the special fund from which the appropriation or appropriations were made.

Appropriations for the purchase of land or the erection of buildings or new constructions shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made.’

“Section 229 of Title 45 of said Code as amended by the Act of the Legislature of Alabama, approved May 28, 1953, reads as follows: “§ 229. (1463) (878) (2574) Appropriation for institutions.—For the support, maintenance, repairs and improvement of the Alabama State Hospitals, such amount as shall be appropriated by the legislature in the general appropriation bill which sum shall be paid monthly every year by the state for every one of all the indigent and criminal patients, that the superintendent certifies were present in the hospital on the last day of the preceding month. The comptroller shall issue a warrant for that amount on the state treasury,

payable to the treasurer of the hospitals, who shall disburse such funds under regulations of the board of trustees. The governor must provide for the prompt payment of all warrants drawn for the support of the Alabama state hospitals, and these warrants shall be preferred in payment to all others drawn on the general fund in the treasury. Immediately after the expiration of the fiscal year on September thirtieth, the governor shall require an examiner of public accounts to examine and audit the accounts and books of the steward and treasurer of the hospitals and report thereon to the governor, who shall send a copy thereof to the superintendent of the hospitals, to be laid with his report before the board of trustees at their annual meeting. If at any time it shall appear, in the opinion of the director of the department of finance, that the needs of the indigent and criminal inmates will be thereby met and adequately provided for, the governor may reduce said weekly payment and fix the same in an amount considered to be sufficient therefor. The allocation of the funds appropriated for the support of the institutions as provided herein shall be made in accordance with the provisions of Title 55, Chapter 4, Article 3, Code of Alabama, 1940. Provided, however, all fees, receipts and income, other than the appropriation in the general appropriation bill, are hereby appropriated for the support, maintenance, repairs and improvements of the institutions and shall be expended in the manner and for the purposes determined by the board of trustees.'

"For many years prior to 1953 said Section 104 of Title 55 had been the law, it having appeared for the first time in the 1940 Code of Alabama as a codification of Section 11 of the General Act of the Legislature of Alabama approved March 16, 1939,—Acts of 1939, page 190, et seq.

"Under a continuing resolution of the Board of Trustees of Alabama State Hospitals heretofore adopted all 'unused, unappropriated funds' remaining as of September 30, of each year are transferred to the capital outlay account of the Hospitals, and are carried in Bank as 'Capital Outlay Funds.' However, no funds received in consideration of right of way grants or as purchase price for sale of lands are involved in these transfers at the end of the fiscal year, as those funds, upon receipt thereof, are immediately deposited in the Capital Outlay Fund Account.

"The per diem per capita appropriation made for the benefit of the Hospitals has never been sufficient in amount to take care of the support, maintenance and repair of the Hospitals and of necessity each year a portion of the proceeds of sale of farm products and the amounts received from pay patients, the amounts received from the operation of the canteen, and other miscellaneous sources, has been used for support, maintenance and repair, with the result that in fact there has never been carried into the said capital outlay

fund any part of any appropriation made to or for the benefit of the Hospitals.

"Your attention is called to the fact that prior to its amendment by said Act of 1953, Section 229 of said Title 45 specifically provided 'That the funds appropriated to and all earnings of said institution shall remain in tact and not revert to or be recovered into the state treasury at the end of any fiscal year.' This provision is omitted from said Section 229 as amended by the Act of 1953.

"Said Section 229 as amended by the Act of 1953 now carries the following specific provisions:

" 'Provided, however, **all fees, receipts and income**, other than the appropriation in the general appropriation bill, are hereby **appropriated for the support, maintenance, repairs and improvements of the institutions and shall be expended in the manner and for the purposes determined by the board of trustees.**' (Emphasis supplied).

"The Hospitals are now confronted with this situation.

"1. Many of our employees have not had an increase in salary for more than two years, and the increased cost of living makes it almost imperative that such increases be made; and,

"2. If such increases are made the sum total of the per capita per diem appropriations, the proceeds of sale of farm products, the amounts received from or for or on account of pay patients and the profits from the canteen and other miscellaneous sources to be received during the present fiscal year, (and in future years unless the per capita appropriation be hereafter increased), not including proceeds of sale of real estate, will be wholly insufficient to take care of these increases in salary, and we are confronted with the proposition that in order to increase these salaries it will be necessary to invade the funds which have heretofore been under the above referred to resolution of the Board of Trustees set aside and designated as 'Capital Outlay Funds.' **No portion of which includes any appropriated funds.**

"In view of all of the above we ask that you give us your opinion as to the following questions:

"(1) In order to provide for the above referred to increase in employees salaries and constantly increasing other expenses, may the Hospitals legally now invade the fund now in Bank to credit of the Hospitals, representing the accumulation of the funds now designated and set aside as 'Capital Outlay Funds,' under the above referred to continuing resolution of the Board of Trustees?

"Your attention is again called to the fact that no money arising from appropriations made to the Hospitals now constitutes any part of this fund designated as 'Capital Outlay funds.'

"(2) Does the term 'all fees, receipts and income other than appropriations in the general appropriation bill,' as used in the above quoted part of Section 229 of Title 45 of the Code, as amended, legally include either or any of the following:

"(a) Funds received by the Hospitals from the sale of farm products;

"(b) Funds received by the Hospitals from or for pay patients;

"(c) Funds received as rents;

"(d) Funds received for grants of right of ways over Hospital lands;

"(e) Funds received from sale of real estate owned by the Hospitals; (In this connection your attention is called to the fact that there is now in process of being closed a sale by the Hospitals of a tract of land containing approximately 26½ acres to the Board of Trustees of the University of Alabama, at and for the purchase price of \$125,000.00 in cash. This tract of land lies North of lands now owned by the University and South of the Warrior River).

"(f) Funds received from any other source than per capita appropriation.

"We cannot conceive of any intent on the part of the Legislature, by the above referred to amendment, to make these funds 'appropriations' which will revert to the State Treasury under the provisions of the above quoted Section 104 of Title 55 of the Code.

"(4) May the Hospitals use for support, maintenance and repair of the Hospitals funds arising from,

"(a) Sale of rights of way over Hospital lands; and,

"(b) Funds received from sale of Hospital lands?

"For your further information there is hereto attached a list marked Exhibit 'A' which sets forth in detail the sources and amounts of all receipts of the Hospitals during the fiscal year ending September 30th, 1963.

"It is my purpose to call you over the phone in a few days for

the purpose of setting a date on which I may come to Montgomery and discuss details, in person with you or that one of your assistants to whom this matter is referred by you so that I may make sure I have made clear our problem.

My answer to your first inquiry is in the affirmative.

You very strongly indicate in your request that there is some doubt in your mind as to whether or not the fees, receipts, and income other than the appropriation in the general appropriation bill, which are appropriated to the hospitals by Title 45, Section 229, Code of Alabama 1940, lapse and revert to the general fund under the provisions of Title 55, Section 104, Code of Alabama 1940.

In my opinion, these funds do not revert or lapse under the provisions of Section 104, *supra*, for two reasons: The statute itself appropriates these funds for the support, maintenance and repairs of the institution, providing that the funds shall be expended in the manner and for the purposes determined by the Board of Trustees, and makes a distinction between these funds and funds appropriated by the general appropriation bill. This, in my judgment, removes all fees, receipts and income of the State Hospitals from the operation of Section 104, *supra*.

Aside from Section 229, *supra*, your attention is directed to Title 55, Section 103, Code of Alabama 1940, which said section deals with departmental and institutional receipts and provides in part as follows:

"§ 103. Departmental and institutional receipts.— . . . Anything herein to the contrary notwithstanding, however, this **article** shall not apply to the fees, receipts and income (other than appropriations) of the department of conservation, the department of agriculture and industries, or any educational, correctional or **eleemosynary institution** or to any endowment or trust fund, or gifts to any such institutions or to the income from such endowments or trust funds, or to private funds belonging to students or inmates of such institutions, nor shall such funds be subject to any allotment under this **article** or be taken into consideration in making any allotment or prorating of appropriations under this article, and all appropriations made to any such institutions are hereby declared to be in addition to such fees, receipts and other income, and all allotments from such appropriations shall be paid over to such institution, and when such allotments are received by such institutions, the same shall be deposited in any bank or banks in the state of Alabama, which have been duly designated and qualified as state depositories, for the use and benefit of such institution, and such funds shall be available only on the check of such institution depositing them, which is hereby authorized to withdraw such funds at its discretion."

The above-quoted portion of Section 103 very plainly shows that the receipts, fees and income of the Alabama Hospitals are not subject to the provisions of the Budget and Control Act and such fees, receipts and income may be expended as directed by the Board of Trustees of the Hospital.

It is noted in your request that there is a continuing resolution of the Board of Trustees of the Alabama State Hospitals designating these fees, receipts and income as "Capital Outlay Funds." This resolution was, of course, passed under the authority of Section 229, *supra*, whereby all of the funds and income of the hospital may be expended in the manner and for the purposes determined by the Board of Trustees. In my judgment, it necessarily follows that the Board of Trustees now has the authority to designate these funds as other than "Capital Outlay Funds" and may use them for any purpose deemed necessary or expedient in and about the operation and maintenance of the Alabama Hospitals. I, therefore, suggest that the Board of Trustees adopt another resolution designating in such resolution the purposes for which these funds are to be used.

In my opinion, all of the funds designated in your second request by (a), (b), (c), (d), (e), and (f), are "fees, receipts and income other than appropriated in the general appropriation bill" and may be used by the Board of Trustees in the manner and for the purposes determined by it. Section 229, *supra*.

In answer to your question No. 4, for the reasons hereinabove pointed out, the Board of Trustees may use for the support, maintenance and repairs of the hospital funds arising from (a) sale of rights of way over hospital lands and (b) funds received from sale of hospital lands, provided, however, this part of the opinion does not apply to the land located at Mount Vernon in view of Section 229(1) of Title 45, Code of Alabama 1940, and the Acts of Congress appertaining thereto.

This opinion has no application to the funds of any other agency, department, or institution of the State other than the Alabama Hospitals.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 2, 1963

Honorable Charles C. Adams
Judge of Probate
Tallapoosa County
Dadeville, Alabama

Cost and Fees — Funds — Solicitors — Tallapoosa County.

1. Solicitors Fund of Fifth Judicial Circuit composed of all solicitor fees collected by any court in the Fifth Judicial Circuit.

2. In support of the County Solicitor of Tallapoosa County, the Circuit Solicitor may requisition expenditures against the Solicitors' Fund of the Fifth Judicial Circuit only for payment of those expenses necessarily incurred by the County Solicitor in the discharge of those duties performed under the direction and at the request of the Circuit Solicitor in the proper discharge of the duties of the office of the Circuit Solicitor.

Opinion by Assistant Attorney General Webb.

Dear Judge Adams:

I have received your letter of October 28, 1963 in which you request my official opinion as follows:

“RE: Senate Bill No. 353 Enacted into Law 9-14-63

Creating a Solicitor's Fund for the Fifth
Judicial Circuit Solicitor

“The above-styled act has become law.

“It will be appreciated if you will give me an opinion on the following questions which have arisen concerning it:

“1. Under the provisions of the captioned Act, Section 85, Title 11, Code of Alabama 1940 sets forth which fees are to go into the new fund set up by this statute. In the said Section 85, Title 11, are set forth certain crimes, among which are misdemeanors and bastardy, which originate in the County Courts of Tallapoosa County, Alabama. Are the Solicitor's fees charged and collected in the County Courts of Tallapoosa County, Alabama to be placed in the Fifth Judicial Circuit Solicitor's Fund?

"2. If your answer to Question 1 is in the negative, please itemize what fees are to be placed therein?

"3. If your answer to Question 1 is in the affirmative, please advise if the Circuit Solicitor may authorize payment of expenses of County Solicitor of this County incurred in the proper discharge of the duties of his office, promoting the welfare of said office and the enforcement of law."

Section 1 of Act No. 485, Acts of Alabama 1963, Regular Session, referred to by you, provides, in pertinent part, as follows:

"**All solicitors' fees** hereafter taxed as cost and collected in the Fifth Judicial Circuit . . . shall be paid into the . . . solicitors' fund, and be used and expended by the circuit solicitor as provided in Section 2 . . . " (Emphasis supplied.)

The Supreme Court of Alabama has held that in the absence of anything to indicate to the contrary the words of the statute will be given the meaning which is accepted in everyday usage. See **Republic Steel Corporation v. Horn**, 268 Ala. 279, 105 So. 2d 446, and **Holloway v. State**, 262 Ala. 437, 79 So. 2d 40. I am, therefore, of the opinion that in view of the wording of Section 1 of Act No. 485, supra, your question numbered one should be answered in the affirmative. This, of course, renders inapplicable your Question No. 2.

In relation to your third question, I cannot answer this with a yes or no as it is worded. I note that the County Solicitor of Tallapoosa County, referred to in your letter, is elected under the provisions of Act No. 126, Local Acts of Alabama 1935, page 58, which provides, in addition to those duties of a deputy Solicitor, certain additional duties and responsibilities to the Board of Education and the County Court of Commissioners. Other duties and responsibilities to the Sheriff were added under the provisions of Act No. 576, Local Acts of Alabama 1947, page 389.

Deputy Solicitors appointed under Title 13, Section 256, Code of Alabama 1940, have only those duties enumerated which are also duties of the Circuit Solicitor, and the Deputy Solicitors are solely responsible to the Circuit Solicitor and serve under his direction.

Section 2 of Act No. 485, provides, in pertinent part, as follows:

"The Circuit Solicitor of the Fifth Judicial Circuit is hereby authorized to requisition expenditures against the solicitor's fund for the payment of any and all expenses necessarily incurred by him in the proper discharge of the duties of **his office** . ." (Emphasis supplied.)

I am of the opinion, therefore, that the Circuit Solicitor may requisition expenditures against the Solicitors' Fund only for payment of those expenses necessarily incurred by the County Solicitor in the discharge of those duties performed under the direction and at the request of the Circuit Solicitor in the proper discharge of the duties of the office of Circuit Solicitor.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

December 4, 1963

Mr. Hunter Phillips
Tax Assessor Choctaw County
Choctaw County Court House
Butler, Alabama

Taxation — Exemptions — Manufacturing Plants — Title
51, Section 3, as amended Code of Alabama Recompiled 1958.

Resolutions passed by county and municipal governing bodies exempting plant and additions thereto from ad valorem taxes levied by said bodies for a specified period of ten years exempt said additions to the plant for the remainder of the original period of exemption without the necessity of making new application therefor.

Opinion by Assistant Attorney General Payne.

Dear Mr. Phillips:

Your letter dated November 14, 1963, requesting official opinion of this office reads as follows:

"The Board of Commissioners, Choctaw County, Alabama, granted an industrial exemption to Choctaw Mills, a corporation, for all taxes assessed thereto for a period of ten years 'embraced in the tax years of 1960-61 to 1969-70, inclusive, on the factory or plant, and all additions thereto, or extensions thereof', said exemptions being entered on the records of said Board on November 1, 1960, as evidenced by a copy of said resolution granting said exemption attached herewith.

"The Town of Butler, Alabama, granted a similar exemption for the same period on November 8, 1960, as evidenced by copy of their resolution attached herewith.

"Choctaw Mills, Incorporated, made an assessment of their personal property with the Choctaw County Tax Assessor on November 6, 1961 for their 1962 taxes, listing \$29,640.00 in Machinery on which an industrial exemption was granted pursuant to resolutions quoted above by Choctaw County and Town of Butler, excepting School tax levies for the County.

"Choctaw Mills, Incorporated, made an assessment of their personal property with the Choctaw County Tax Assessor on November 20, 1962, for 1963 taxes, listing \$136,870.00 in Machinery and Equipment, an addition of new machinery and equipment since October 1, 1961, of \$107,230.00 (not a raise in valuation by the County Board of Equalization on the old machinery).

"My question is; may the new machinery and equipment \$107,230.00 value, added to the plant since October, 1961, and included in their 1963 assessment, be included in the industrial exemption granted November, 1960 by the County and Town of Butler, automatically, under the terms of the resolutions adopted? No application was made for exemption on the additions of machinery.

"However, I feel certain that the County and Town of Butler would have granted industrial exemption to the extent allowed by law if the application had been made at the proper time, as the industry mentioned is a great asset to our county and community.

"If I was correct in granting the exemption for the new machinery on 1963 taxes, would they have 8 more years exemption after 1963 taxes (rather, the same times as the original machinery), or begin a new 10 year term exemption with 1963 taxes?

"I will appreciate an early reply as practicable as collection on the above assessment will be made before long by the Tax Collector and I gave the corporation credit for industrial exemption for County and Town taxes on both the old machinery and equipment on their 1963 taxes and would like to know if that was a mistake or correct."

Title 51, Code of Alabama, Recompiled 1958, Section 3, as amended, authorizes county and municipalities of the state to grant the ad valorem tax exemption to industries as expressly set out therein. Among the statutes' provisions is the authority to exempt from ad valorem taxation, machinery, and other equipment of plants and "additions thereto, or extensions thereof." Consequently, a resolution by a county or municipality granting ad valorem tax exemption to an industry and any additions thereto for a specified period of time, would in my opinion, include additions to the plant or industry during said period.

I observe from the resolutions of the county of Choctaw and the town council of Butler, which you forwarded to me for consideration, that the industries involved are exempted from "all taxes assessed . . . on the factory or plant . . . **and all additions thereto, or extensions thereof.**" This language of the resolutions tracks Section 3 of Title 51, supra. The resolutions also provide: ". . . it being the purpose and intention hereof to exempt . . . all property . . . **now or hereafter acquired.**"

In view of the above, the county and municipal governing bodies to which you refer expressly included additions to the industry to be exempted. However, the exemption thus granted is limited to the time and period specified in the resolutions. The period expressly granted is for the "tax years of 1960-1961 to 1969-1970, inclusive." Therefore, your first question is answered in the affirmative. That is to say, the original exemption granted by the respective authorities would extend to the new machinery and equipment of the value of \$107,230.00, as stated in your request, to the end of the exemption period which terminates with the tax year 1969-1970. Under the circumstances as presented by your letter of request, and, the wording of the resolutions referred to above, it was not necessary that new application be made for the inclusion of the plant **additions.**

The answer to your second question has been answered by what has been stated above. The exemption as to the new machinery would extend to the end of the period originally granted which terminates at the end of the tax year 1969-1970. The exemption would not cover a new ten year period of exemption.

It should be borne in mind that the conclusion reached herein is based upon the express wording of the resolutions of the governing bodies, exempting the plant **and additions thereto** to the specific period of ten years, viz., "tax years of 1960-1961 to 1969-1970, inclusive."

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

December 4, 1963

Hon. Ralph P. Eagerton
Chief Examiner
Examiner of Public Accounts
Montgomery, Alabama

Funds — Highways and Highway Department.

Funds derived from sale of bonds by the Alabama Highway Authority pursuant to Act No. 26, Acts of Alabama, First Special Session 1963, may not be used for maintenance of highways and bridges.

Opinion by Assistant Attorney General Cage.

Dear Mr. Eagerton:

I have your request for an official opinion, bearing date of November 6, 1963, which is as follows:

"During the course of the current audit of the State Highway Department, we have noted that transfers have been made from the State Bond Funds to the Road and Bridge Fund for the purposes of 'maintenance' of roads in the first Division and those counties whose road program comes under the control of the State Highway Department by virtue of local acts. No contracts have been let or are involved in the transfers.

"I note that Section 8 of Act No. 26, Acts of Alabama 1963, First Special Session, provides, in pertinent part, as follows:

"The proceeds of the bonds . . . shall be carried in the public road and bridge fund . . . to be drawn on . . . only for the purpose of paying the cost of **constructing and reconstructing** public roads and bridges or work incidental and related thereto . . .' (Emphasis supplied.)

"I request your opinion as to whether or not the State Highway Department may expend bond funds for 'maintenance' in the instances noted. I realize that the bond funds should be carried in the Public Road and Bridge Fund and that the transfers are, therefore, proper. However, if they may not be expended for maintenance, a separate sub-account may become necessary for proper accounting of these funds."

It is my understanding that the "bond funds" referred to in your request are those funds derived from the sale of bonds by the Alabama Highway Authority as authorized by Act No. 26, Acts of Alabama, First Special Session, 1963. Such funds, by said act, are required to be carried in the State Treasury in the Public Road and Bridge Fund, and are subject to be drawn on by the Alabama Highway Authority with the approval of the State Highway Department and the Governor for the purposes as listed in said act.

It has been the policy of the State of Alabama for a number of years to use monies acquired through bond issues of various types for

the purpose of constructing, reconstructing, or improving of highways and bridges and to use the regular income of the department for ordinary operation and maintenance. Such policy was set out in Title 23, Section 15, Alabama Code, 1940, originally adopted in 1927, and has been followed in substance through the successive highway financing acts. As pointed out in your letter, Section 8 of Act No. 26, supra, limits expenditures of the proceeds of the bonds therein authorized to constructing and reconstructing public roads and bridges or work incidental and related thereto.

In answer to your general inquiry, it is therefore my opinion that proceeds of the bonds authorized by Section 8 of Act No. 26, Acts of Alabama 1963, First Special Session, may not be used for ordinary maintenance of the public roads and bridges of this State.

I am unable to answer your specific inquiry as to whether the earmarking of these funds for use in the first highway division and certain counties of the State is contrary to law. As you pointed out in your letter, the public road and bridge fund is the proper account for these monies. No taint of illegality would attach until there is an expenditure.

I am advised that the State Highway Department is so organized that the bureau of maintenance performs all State Highway construction wherein State forces and equipment do the actual construction and no contract is let to a contractor for such construction. Under this administrative organization, it would be proper for the bureau of maintenance to utilize bond funds for the purposes of construction or reconstruction of public roads through use of State forces and equipment.

If these funds are to be so expended by the bureau of maintenance for the purpose of constructing or reconstructing of roads, and such expenditures were properly documented, they would, of course, be permissible.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 6, 1963

Honorable John A. Sankey
Judge of Probate of Montgomery County
Montgomery County Court House
Montgomery, Alabama

Insane Persons — Arrests.

1. A Sheriff or any officer or person may take into custody

or arrest any insane person who is at large and not under the control, restraint or management of any person, without a warrant, provided that such insane person is carried immediately to the Probate Judge of the county, who shall issue a mittimus or commitment of such insane person to the county jail or the Alabama state hospitals, as provided in Title 15, Section 432, Code of Alabama 1940 (Recompiled 1958), until inquisition proceedings may be had as to such person so confined as provided in Title 45, Sections 205, 208, and 210, Code of Alabama 1940 (Recompiled 1958).

2. If the Sheriff refuses to take into custody or arrest an insane person who is at large and not under the control, restraint, or management of any person, without a warrant, mittimus, or commitment, then the Probate Judge of the county, if he is reasonably convinced after investigation that the case is a suitable one, may issue a warrant, mittimus, or commitment authorizing the Sheriff to take into custody or arrest such person and hold him in the county jail until inquisition proceedings may be had as to such person as provided in Title 45, Sections 205, 208, and 210, Code of Alabama 1940 (Recompiled 1958).

Opinion by Assistant Attorney General Hall.

Dear Judge Sankey:

I have your letter of November 27, 1963, which is as follows:

"In Re: Title 15, Section 432

Arrest of Insane Persons or Maniacs.

"1. Is the Sheriff of a County authorized to arrest and commit to jail, without a warrant, a person alleged to be of unsound mind and who should be restrained until such person can be committed to a mental institution?

"2. Would the Sheriff be authorized to apprehend a person alleged to be of unsound mind on complaint of some relative or the Probate Judge, without a warrant, but who has not committed any criminal offense but simply needs to be restrained?

"If you answer the questions in the affirmative what should be the nature of the complaint the Sheriff must have?"

Title 15, Section 432, Code of Alabama 1940 (Recompiled 1958) reads as follows:

“Arrest of insane persons or maniacs.—Any insane person who is at large and not under the control, restraint, or management of any person may be taken into custody or arrested by any officer or person and carried immediately to the probate judge of the county, who shall issue a mittimus or commitment of such insane person either to the county jail or the Alabama state hospitals until inquisition proceedings may be had as to such person so confined.

Thereafter the person so confined shall abide by the decree or order of the inquisition proceedings. When such person is brought before the probate judge, if the judge shall be satisfied that the person brought before him is not insane, he may direct the discharge of such person from custody and arrest and decline to institute the proceedings of lunacy. But if the judge of probate be satisfied that such person is insane, or if he has a reasonable doubt as to his sanity, he shall have the person or persons so bringing the alleged insane person before him to institute the inquisition proceedings of lunacy, as is now provided by law.”

It is my understanding from our telephone conversation on December 2 and December 4, 1963, that the Sheriff of Montgomery County refuses to take into custody or arrest alleged insane persons who are at large and not under the control, restraint, or management of any person, without a warrant, mittimus, or commitment.

However, your attention is invited to the fact that the arrest does not have to be made by the Sheriff, but may be made by any officer or person.

While it is my opinion that Title 15, Section 432 authorizes the Sheriff to take into custody or arrest such person without a warrant, mittimus, or commitment, nevertheless if he refuses to do so, it is my further opinion that you, as Probate Judge, if you are reasonably convinced after investigation that the case is a suitable one to require restraint for his or others' welfare, may issue a warrant, mittimus, or commitment directed to the Sheriff requiring him to take into custody or arrest such person and hold him in the county jail until inquisition proceedings may be had as provided in Title 45, Sections 205, 208, and 210, Code of Alabama 1940 (Recompiled 1958). These Code sections must be read together to accomplish the purpose intended. In this connection, see Quarterly Reports of Attorney General, Vol. 22, pages 41, 44, and Vol. 110, page 79. 29 Am. Jur., Insane Persons, Sec. 39, n. 4, 5, pages 167-168.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

December 9, 1963

Hon. R. R. Coleman
Tax Assessor
Clarke County
Grove Hill, Alabama

Taxation—Ad Valorem Exemptions on Charitable Trusts.

1. Community house, park, swimming pool, tennis courts and golf course used exclusively by a charitable trust, recognized by the Internal Revenue Service as a charitable trust under the provisions of Section 501(c)(3) of the Internal Revenue Code is exempt from ad valorem tax.

2. The charging of green fees for the use of the golf course which green fees represent only a small portion of the operating expense of said facilities does not preclude the exemption.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your inquiry of December 2, 1963, which is as follows:

"Under date of December 15, 1947, J. E. Barbey of Reading, Pennsylvania, Howard B. Snader of Temple, Pennsylvania, E. Oscar McClure of Jackson, Alabama, Clarence M. White of Jackson, Alabama, and Clifton B. Gillmore of Grove Hill, Alabama, executed a declaration of trust establishing a trust under the name of 'Vanity Fair Mills Fund.' The declaration of trust was recorded in the Probate Office of Clarke County, Alabama, on July 16, 1948, in Record Book 336, at Pages 171-174.

"The purposes of the trust in the aforesaid instrument are declared to be:

"The purposes of the trust shall be to provide, maintain, and contribute to charitable, educational and medical facilities or opportunities to the residents and inhabitants of Clarke, Monroe and neighboring counties in the State of Alabama.'

"The Trustees then in office, to wit, J. E. Barbey, Harold G. Miller, E. Oscar McClure, Clarence M. White and Clifton B. Gillmore, under date of May 16, 1952, executed an amendment to the original declaration of trust whereby the name of the trust was changed to Vanity Fair Mills Foundation-Clarke. This amendment was filed in the Probate Office of Clarke County, Alabama, on June 19, 1952,

and is recorded in Record Book 359, at Pages 383-384.

"The Deputy Commissioner of the Internal Revenue Service under date of August 9, 1949, in a letter to Howard B. Snader, Trustee, held that the Foundation was a charitable trust and was exempt from federal income tax under the provisions of Section 101(6) of the Internal Revenue Code (which corresponds to Section 501(c)(3) of the Internal Revenue Code of 1954) and that contributions made to the Foundation are deductible to the donors in arriving at their taxable net income in the manner and to the extent provided by Section 23(o) and (q) of the Internal Revenue Code of 1939 (which became Section 170 of the 1954 Code).

"The Foundation has continued to this date to be recognized by the U. S. Treasury Department as a charitable trust, exempt under the provisions of the Internal Revenue Code and all contributions to the Foundation by donors have been allowed as contributions to a charitable organization.

"The Trustees of the Foundation own in fee simple a tract of land in the City of Jackson, Alabama, containing approximately one hundred acres, the first portion of this tract was acquired in July 1948, and the last acquisition was on September 25, 1957.

"This tract of land has been converted and landscaped as a public park; there has been constructed on it one of the largest outdoor swimming pools in the State of Alabama; picnic grounds and play grounds have been provided; a commodious community house (including modern kitchen, dining facilities, large assembly hall, game room, ladies' and men's lounges), which has a replaceable value of at least \$150,000, has been constructed and furnished; permanent modern tennis courts have been provided; the community house and the swimming pool were the first facilities constructed immediately following the initial acquisition of land in 1948 and thereafter these other facilities have been added and the premises have been maintained in a beautiful land-scaped and park-like condition, with hard surfaced roads, parking lots, etc. All of these facilities are now and for years have been open to the public without charge.

"It has been the policy of the Foundation to have the Jackson community participate to the fullest extent in the actual management of the facilities provided by the Foundation. Hence, the community house, park, etc. has throughout the years been under the control and direction of a 'Park committee' of local citizens appointed by the Trustees of the Foundation.

"The Park Committee supervises the use of the community house, assigning its use to applicants on a first come first serve basis.

"Reports of the Park Committee to the Trustees of the Foundation

disclose that the community house is used almost constantly by the local citizens, as disclosed by the following tabulation:

1958 — 380 times

1959 — 353 times

1960 — 370 times

1961 — 334 times

1962 — 273 times

"Each year the Park Committee sponsors a supervised summer recreational program in the park and necessary funds for this purpose are provided by public subscription. The 1959 report of the Park Committee to the Trustees recites the fact that the Women's Clubs of Jackson have contributed \$5,700.00 to the equipment of the modern kitchen of the community house. The following quotations from reports of the Park Committee to the Trustees of the Foundation are indicative of the public use and appreciation of the facilities:

"From 1961 Report: 'The Committee is appreciative of the additions made during the past year to the park and community house; and for the excellent manner in which the entire facility is maintained. Our park is a continuing source of goodwill and one of the best advertisements our area has.'

"From 1962 Report: 'The addition of many more convenient picnic tables in the park are certainly welcome and appreciated . . . The park, community house, recreation facilities are constant source of amazement to the many visitors in Jackson and of equal pride to our local citizens.'

"Some time prior to September 9, 1957, considerable demand developed among the local citizenry for the Foundation to construct on its properties at Jackson a nine hole golf course. On September 9, 1957, the foundation agreed to construct this golf course provided the local citizens would donate as much as \$25,000.00 to the project. The donations were made and the individual donors were allowed credit for the same on their income tax returns as a donation to a charitable organization. With these donations, and with funds previously donated by other substantial donors, a nine hole golf course was constructed on the premises of the Foundation.

"In keeping with the policy already established that the facilities of the Foundation should be under the day to day control and management of local citizens, on August 8, 1958, the Trustees of the Foundation established a Golf Committee, composed of local

citizens, to supervise the use of the golf course in much the same way as the Park Committee had throughout the years supervised the use of the community house, park and other facilities of the Foundation.

"In view of the fact that the golf course was a relatively expensive facility and required substantial sums of money for its maintenance, the Foundation announced that the people using the golf facility would be required to make some contribution toward its maintenance and hence, the Golf Committee was authorized to fix annual and daily green fees under the following directive from the Trustees of the Foundation:

"That in view of the fact the construction of the golf course required substantial sums of money and substantial sums of money will be required for the maintenance of the golf course, and in view of the fact that the Foundation is a charitable organization, dependent upon contributions for financing its program, the Golf Committee is hereby authorized to fix, from time to time, a sum to be paid by each applicant to play on an annual basis, the same to be paid in the nature of daily or annual green fee but the same to be considered and treated as a contribution toward the maintenance of the property and the Golf Committee may condition the permission to play upon the payment by the applicant of the sum so fixed; that except for infraction of its rules and regulations, or for failure to make the annual contribution, the Golf Committee may not deny or suspend permission to play on an annual basis to any person who has since January 1, 1957, contributed more than \$200.00 in cash or who does in the future contribute \$200.00 in cash for the general purposes of the Foundation, and has paid the annual fee for the year in which the applicant desires to play, and that except for infraction of its rules and regulations or for failure to make the annual contribution, the Golf Committee may not deny or suspend permission to play on an annual basis to any person who has been granted and holds a permit to play on an annual basis on the golf course of Vanity Fair Mills Foundation-Monroe and shall have also paid for the calendar year for which permission to play on an annual basis is requested, the annual contribution to this Foundation. Provided, however, that the Golf Committee may prorate the annual contribution (annual green fee) as of July 1 of each year."

"Pursuant to this directive the golf Committee has been collecting annual green fees in the amount of \$50.00 and from those who do not have a permit to play on an annual basis, a daily green fee in the amount of \$2.00. The golf course cannot adequately accommodate all who desire to play on it. Hence, the Committee has placed certain geographical restrictions on those who are eligible to play so as to better accommodate the local citizenry. The receipts from

these green fees provide less than 25% of the cost of maintaining the golf course.

"The following quotations from annual reports of the Golf Committee to the Trustees are indicative of the use of the facility by the public generally:

"From 1959 Report:: 'Finally, the Golf Committee feels the course is being used by a wide and diversified group of people and that the course is very much appreciated . . . We appreciate the interest of the Vanity Fair Foundation Trustees in providing such a fine facility and we offer our cooperation to them in any manner they may see necessary to continue the success of this facility.'

"From 1962 Report: 'Our total registration since the course opened is 35,276 . . . The golf course is a continuing and constant benefit to our community and this area, a source of recreation as well as an outstanding attraction for the visitors to Clarke County and Washington County. Your efforts and expenditures to maintain this facility are appreciated by both the golfers and the people throughout our community—area.'

"The Foundation is a non-profit, charitable organization. Its only source of funds is donations made to the Foundation and the fees which are charged golfers for the use of the golf course, which fees fall far short of providing the actual maintenance cost of the golf course. This is established by the following tabulation from the records of the Foundation:

Expended on capital outlay and maintenance of the facilities by the Foundation		\$314,889.15
Source of the above funds:		
Sale of timber	\$ 483.72	
Received from annual and daily green fees	32,122.50	
Donations to the Foundation	282,282.93	\$314,889.15

"The above information has been furnished me by Ward M. Ostberg, who is Secretary of the Foundation and the custodian of its records. I believe the same to be entirely factual and true.

"Based on my own personal knowledge I wish to state that the above facilities of the Foundation are deeply cherished by the people of this area. The beautiful and well maintained park, community house, tennis courts, swimming pool, golf course, etc. are an outstanding attraction of this area, unequaled elsewhere, and

used daily and constantly by an appreciative public. No governmental agency in a rural county could or does provide such facilities for the public. I wish to also state that no portion of the property of the Foundation is let for rent or hire and no portion is used for business or commercial purposes.

"The Foundation beginning with its first acquisition of real estate has filed a return of its real estate and claimed the same as exempt as a non-profit, charitable foundation. I have not assessed any taxes against the Foundation. However, for my continued protection I would like to have your official opinion as to whether or not these properties of Vanity Fair Mills Foundation-Clarke, under the facts above recited, are exempt from taxes."

Upon the above statement of fact, it is my opinion that the property is exempt from ad valorem tax under Section 2 of Title 51 of the Recompiled Code of Alabama, the pertinent provision of which reads as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other:

"(a) . . . All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, used by any educational, religious or charitable institutions, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for education, religious or charitable purposes . . ."

According to the statement of fact, the Vanity Fair Mills Foundation-Clarke is a charitable trust exempt from federal income tax under the provisions of Section 501(c)(3) of the Internal Revenue Code and contributions made to the Foundation are deductible to the donors in arriving at their taxable net income; and that all contributions and donations to the Foundation have been allowed as deductible by the Internal Revenue Service.

The American Law Institute recognizes that charitable purposes include the following:

- (1) Governmental or municipal purposes.
- (2) Other purposes which are beneficial to the community.

10 American Jurisprudence (Charities) 622.

It also appears from the statement of fact that no portion of the

property of the Foundation is let for rent or hire and no portion is used for business or commercial purposes. This brings the Foundation squarely within the provisions of the statute.

It further appears from the statement of fact that the golf course is an expensive facility and requires substantial sums of money for its maintenance and to partially cover this expense green fees, either annual or daily, are charged to those who play on the course but that these fees in no wise cover the cost of the operation of the course, in fact amount to less than 25% of the cost of maintaining the course. The charging of these fees for the use of the golf course, under the circumstances related, is not incompatible with the exclusive use of the property for charitable purposes and does not deprive the Foundation of its exemption from ad valorem tax.

"The mere fact that a charity, such as a hospital, makes a charge to help defray its expenses will not destroy its character as a public charity." 10 American Jurisprudence (Charities 589).

"'Exclusive use' does not preclude charging small fees so long as the entire property was primarily and inherently devoted to charitable purposes." Opinion of the Attorney General to Honorable Roy Johnson, Tax Assessor, Jefferson County, Alabama, Biennial Report, October 1, 1936—September 30, 1938, Page 481.

The Internal Revenue Service, in dealing with the exempt status of charitable organizations has held::

"If otherwise qualified, a Home for the Aged which is dedicated to providing and does furnish care and housing to its residents at established rates which are substantially less than the cost of the services furnished is exempt." Rev. Rul. 61-72, 1961-1 CB 188 (Commerce Clearing House, Federal Tax Reporter 3033.295).

Substantially the same point here under consideration was ruled in favor of a charity in the aforesaid opinion of the Attorney General to Roy Johnson. Also see the authorities cited in said opinion.

Hence, it is my opinion, upon the above facts, that the property of Vanity Fair Mills Foundation-Clarke at Jackson, in Clarke County, Alabama, is exempt from ad valorem tax.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

December 10, 1963

Hon. Ralph P. Eagerton

Chief Examiner

Examiners of Public Accounts

Montgomery, Alabama

Taxation — Ad Valorem Taxes — Exemption — Counties.

Additions and extensions to a plant or factory having been exempt "from county taxation" in 1955 under Title 51, Section 3, as Amended, Code of Alabama 1940, are exempt for the remainder of the exemption period from a public hospital tax subsequently levied by the county in 1962, notwithstanding the provisions of Act No. 37, Acts of Alabama 1961, Special Session, Page 1889, which further amended Title 51, Section 3, *supra*.

Opinion by Assistant Attorney General Livingston.

Dear Mr. Eagerton:

Your request for an official opinion bearing date of November 18, 1963, is as follows:

"I request your official opinion as to whether or not the following Resolution of the Board of Revenue and Road Commissioners of Mobile County, granted in 1955, exempts the affected corporation from the public hospital tax of Mobile County, levied by the county governing body in February of 1962, without re-application on the part of the corporation granted the exemption, in view of Act No. 37, Acts of Alabama 1961, Special Session, Page 1889.

"The petition by the corporation, as printed in the Resolution, requested exemption from all ad valorem taxes with the exception, of course, of school taxes and land in the following wording:

"'. . . all ad valorem taxes for county purposes of, and to procure the remission of any and all such taxes which are or may be assessed upon, certain property constituting additions . . .'

"The Resolution by the Board of Revenue and Road Commissioners of Mobile County granted the exemption with the exception of school taxes and taxes on the land, as follows:

"'That . . . corporation, be and the same is hereby allowed exemption from County taxation, authorized by law, for and upon the additions and extensions to and of the present plant, mill or factory of the said Company . . .'

Act No. 37, Acts of Alabama 1961, Special Session, Page 1889, amended Title 51, Section 3, as Amended, Code of Alabama Recompiled 1958, and added the following provisions:

"The remission of taxes by a county governing body pursuant to this section shall operate to grant an exemption only from all taxes being levied for county purposes on the date of the resolution or order granting the remission or such portion of such taxes as is stipulated therein for the period therein designated; but shall not be construed to grant an exemption from any additional taxes thereafter levied or authorized to be levied by such county, unless the intent to extend the exemption to additional taxes, levied or authorized to be levied by such governing body subsequent to the date of the remission, is clearly stated in the resolution or order.

Provided, however, any county governing body which has remitted the whole or any part of the taxes assessed against a plant, industry or factory for county purposes, as authorized hereinabove, upon subsequently being authorized to levy or upon subsequently levying any additional taxes, may by like resolution or order, by which it had previously remitted the taxes then assessed against any such plant, industry, or factory remit such additional taxes for the remainder of the period of which such plant, industry or factory has been granted an exemption from such other county taxation."

Prior to the above amendment, this office in Quarterly Report of Attorney General, Volume 94, page 66, had ruled that an order granting an exemption from all taxation" under Section 3, *supra*, applied to taxes levied during the period covered by the exemption but subsequent to the granting thereof as well as to those levied at the time the exemption was granted. This opinion referred to another opinion of this office dated August 4, 1958, wherein it was held that a resolution of the county board of commissioners which exempted a corporation "from all ad valorem taxes assessed for all county purposes" included exemption from county ad valorem tax levied subsequent to the date of the resolution.

It is noted that the resolution by the Board of Revenue and Road Commissioners of Mobile County in 1955 exempted the corporation "from County taxation, authorized by law, for and upon additions and extensions to and of the present plant, mill or factory of the said company . . ." The resolution did not limit the exemption to "taxes then assessed" but granted the corporation an exemption "from county taxation." Under the above opinion reported in Volume 94, *supra*, and without considering the provisions of Act No. 37, quoted above, it appears that such resolution would be sufficient to exempt the corporation from additional taxes levied during the period covered by the exemption but subsequent to the resolution granting the exemption.

The question arises as to whether the above quoted provisions of Act No. 37 would require reapplication by the corporation and the granting of exemption by the county governing body exempting the corporation from the public hospital tax levied in February 1962. Statutes generally are construed as having only prospective operation unless the intent to give them retrospective effect is expressly declared or necessarily implied. A statute will not be construed as retroactive, unless made so expressly or by unmistakable implication. 18 Ala. Dig. Statutes, Section 263, Page 238. In the case of **Barrington v. Barrington**, 200 Ala. 315, 76 So. 81, it is stated:

“But a statute which gives a new legal effect to conduct or conditions occurring or existing prior to its enactment, thereby imposing upon any person unanticipated disabilities or alterations of legal status, is retrospective in a sense which is odious to the law, and, as to such operation, is strongly disfavored by the courts, even though it does not offend the Constitution by impairing the obligation of a contract or by creating a crime or punishment *ex post facto*. This disfavor has everywhere found expression in a rigorous rule of construction which denies retroactive effect to such a statute unless by its express terms, or by unmistakable implication, the Legislature must have so intended.”

See also the case of **First National Bank of Birmingham v. Jaffe**, 239 Ala. 567, 196 So. 103.

Act No. 37, *supra*, is not explicit in this respect. Insofar as the resolution in question is concerned, to give Act No. 37 retrospective effect would give a new legal status to an exemption granted and existing prior to its enactment and would impose upon the corporation unanticipated disabilities or alterations of legal status. Statutes empowering counties and cities to exempt manufacturing plants from taxation for county and municipal purposes are in open offer by the State to induce investments in new properties through exemption for a limited time and such statutes should be construed to carry out in good faith the State's commitment. **Pullman Car & Mfg. Company of Alabama v. Hamilton**, 236 Ala. 209, 181 So. 244.

It is, therefore, my opinion that the above quoted provisions of Act No. 37 should not be given retroactive effect to the resolution in question and that the exemption granted in 1955 covered all county taxes then levied and the public hospital tax levied in February 1962, for the remainder of the exemption period. Your question is, therefore, answered in the affirmative.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 12, 1963

Honorable B. A. Reynolds, President
Association of County Commissioners of Alabama
513 Madison Avenue
Montgomery, Alabama

Counties — State and State Departments — Elections —
Constitutional Amendments

The Counties are entitled to be reimbursed by State for one-half of expenses incurred by them in printing ballots and expenses of preparing poll lists for amendment election of August 13, 1963, which was postponed by action of Legislature until December 10, 1963.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of November 26, 1963 is as follows:

"On July 2, 1963, Hon. George Wallace, Governor, notified the sheriffs of The State of Alabama that an election had been ordered to be held in the several counties of the State on Tuesday, August 13, 1963 upon proposed amendments to The Constitution of Alabama and informed them that he, as governor, had furnished the newspapers with the proclamations regarding said amendments election to be advertised for four successive weeks commencing with the week of July 15, 1963. He called attention to the provisions of Section 220, Title 17, Code of 1940, which provides that the sheriff must notify the probate judge, etc. and the sheriffs notified the various probate judges throughout the State.

"On July 24, the probate judges throughout the state were notified by The Secretary of State, Mrs. Agnes Baggett, that pursuant to House Joint Resolution No. 86, The Amendments Election had been cancelled and for them to cancel preparations for holding the election of August 13, 1963.

"House Joint Resolution No. 86 sets out that the amendments election as ordered by Act #91 of The Special Session of the 1963 Legislature will entail unnecessary expenses for the state and the **several counties** and that it could be voted on at the same time as other amendments submitted at the 1963 session of the Legislature without detriment to the people or the public interest.

"Our contentions are:

"1. This portion of the resolution was intended to save the state and **counties** additional expenses and not solely to be a saving to the state.

"2. That whether or not the election was held, certain expenses pertinent to the election; namely, printing of the ballots and the preparation of the poll list, had been incurred before the receipt of the letter from Mrs. Agnes Baggett, Secretary of State, notifying the counties that the election of August 13, 1963 had been recalled.

"It was necessary to have the ballots for this election printed and the poll list made in order that we could carry on the election called by Gov. George Wallace for August 13, 1963 and properly advertised by him; further, The Secretary of State, Mrs. Agnes Baggett, certified the holding of said election in pursuance of Section 285 of The Constitution and Title 17, Article 9, Code of 1940 as amended.

"We received the official ballot from the secretary of state witnessed on June 13, 1963 and headed as follows:

"'In pursuance of Section 285 of the Constitution, and Title 17, Article 9, Code of 1940, as amended, the following amendments to The Constitution of Alabama are proposed to be submitted to the qualified electors of the State at an election to be held on Aug. 13, 1963, which is the date of the election ordered to be held by the Legislature of Alabama, and I request that you cause said proposed amendments to be placed upon the ballots to be used in said election on Tuesday, August 13, 1963.'

"The counties were not notified in time to save the expense of printing said ballots and preparing poll list. The wording of the first paragraph of HJR No. 86 distinctly states that the holding of said election will entail unnecessary expenses for the State and the **several counties**.

"Particular attention is called to the fact that Section 430 of Title 17 of the Code provides that the County shall be re-imbursed for one-half of 'expenses incurred in holding and conducting an election.' It goes without saying that an election cannot be held or conducted unless preparations are made for it. Unless ballots and election supplies are printed, and the other materials required by law to be furnished to election electors is prepared, to be furnished to the election officials, an election cannot be held. All of these items are expressly provided for in Section 427 of Title 17, under the definition 'expenses' for which counties are to be re-imbursed

for the 'holding and conducting' an election at which constitutional amendments affecting one or more counties are to be voted upon.

"We contend that it was without question the intent of the legislature to save unnecessary expense for the counties as well as for the state. The counties were complying with The Code of Alabama in having ballots printed and preparing the poll list for said election.

"Our question is: In view of the above stated facts, are the counties entitled to collect from The State of Alabama one-half of the expenses incurred after the proclamations had been furnished by the governor to the newspapers and before receiving notice from The Secretary of State, Mrs. Agnes Baggett, under date of July 24, 1963, giving us authority to cancel preparations for holding the Constitutional Amendments Election on August 13, 1963?"

In addition by another letter dated November 26, 1963, you state the following:

"The Association of County Commissioners of Alabama, at their Mid-Winter Conference held in Montgomery November 21st, unanimously adopted a resolution requesting that I, as President of the Association, ask you for an official opinion relating to the State of Alabama paying one-half of the accrued expense of the Constitutional Amendment Election, which was due to be held on August 13, 1963, but was cancelled.

"I am attaching my request."

House Joint Resolution No. 86, Act No. 217, Regular Session 1963, provides the following:

"WHEREAS, the special constitutional amendment election ordered to be held on Tuesday, August 13, 1963, by Act No. 91, H. 37, Second Special Session 1963, will entail unnecessary expenses for the State and the several counties in view of the fact that the amendment can be voted on at the same time as other amendments submitted at this session without detriment to the people or the public interest; and

"WHEREAS, The Justices of the Supreme Court of Alabama advised the Legislature on a former occasion that there are no requirements of law as to the form that a legislative appointment of the day for an election must take, and that the designation of the day may be incorporated in the act or resolution proposing the amendment or otherwise; and

"WHEREAS, there is no prohibition in law which prevents a redesignation of a day appointed for holding the election on the constitutional amendment proposed by said Act No. 91; now therefore,

"BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That an election upon the amendment proposed by said Act No. 91 is ordered to be held on the first Tuesday after the expiration of three months from final adjournment of the 1963 Regular Session of the Legislature, and the order incorporated in said Act No. 91, Section 2, is hereby rescinded.

"RESOLVED FURTHER, That the Secretary of State, the Honorable Agnes Baggett, is hereby directed to recall her certificate dated June 13, 1963, and forthwith to notify the probate judges of the several counties of this order."

Title 17, Section 166, Code of Alabama 1940, in pertinent part provides that whenever a constitutional amendment is **submitted** to a vote of the qualified electors, the substance or subject matter of each proposed amendment shall be so printed that the nature thereof shall be clearly indicated.

Section 167, Title 17, Code of Alabama 1940, provides that the printing and delivery of the ballots and cards of instructions to voters except in city elections shall be paid for by the several counties respectively. This, of course, has been changed in part by the provisions of Act No. 160, General and Local Acts 1955, page 406.

Act No. 160, *supra*, provides the following by Section 4, thereof: "The State of Alabama shall reimburse a county for one-half of all sums expended by the county in payment of expenses incurred in **holding and conducting** an election at which both amendments to the Constitution affecting one or more counties or subdivisions thereof and amendments affecting the State of Alabama as a whole are voted upon." (Emphasis supplied).

The point is made that since the election was **not held and conducted** on August 13, 1963, no authority exists under said Section 4 to pay one-half of the counties' expenses, which would include those expenses as defined in said Act No. 160.

It is to be observed, however, that since the amendments were **not submitted** to a vote, it could likewise be argued that the counties would not be liable for the printing and delivery of the ballots and cards of instructions under Section 167, *supra*.

By observing further, it is seen that it could be argued, as here, that since the amendments were not **submitted to the people** for ratification or adoption on August 13, 1963, the expense of the publication of the Governor's proclamation could not be paid out of the general fund of the State under Act No. 980, General and Local Acts 1951, page 1654, because of the contention that "submission to the people" is a condition precedent to authority to pay.

The House Joint Resolution changing the date of election should be read and considered in connection with the provision of Section 4 of Act No. 160, *supra*.

The resolution provides in effect that by changing the date of election, the State and **several counties** will be **saved unnecessary expenses**.

By ruling the counties liable for the whole expense incurred to the time of postponement, it might be that this would result in more expense to the counties than if the election had been held on its first date. In this latter event, it is clear that the counties would pay only one-half of expenses as defined in said Act No. 160, it appearing that both amendments affecting one or more counties or subdivisions thereof and those affecting the State as a whole were to be voted upon.

These considerations lead me to the conclusion that the expenses of printing of the ballots and the preparation of the poll lists for the election to be held August 13, 1963, is an integral part of "holding and conducting" the said election, though it was postponed, and within the purview of Section 4 of said Act No. 160.

It is my opinion, therefore, that your question should be and is answered in the affirmative.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 12, 1963

Honorable Dewey Claburn
Honorable L. D. Edmonds
Honorable A. H. Jarvis
Honorable Dures Thomas
Marshall County Board of Revenue
Guntersville, Alabama

Counties — Highways and Highway Departments
— Marshall County

The use of any county equipment, materials, or supplies, or property of any nature, in the custody of or under control of the Commission or any member of the Commission on Government and Finance of Marshall County discussed generally.

Opinion by Assistant Attorney General Screws.

Dear Sirs:

Your request for an official opinion under date of November 19, 1963 is as follows (with the exception that I have renumbered your last three questions, (a), (b), and (c) to (1), (2), and (3), respectively:

"The undersigned are associate members of the Commission on Government and Finance of Marshall County.

"In view of the provisions of Section 9, of Act #294 of the Regular Session of the 1963 Legislature, we respectfully request your opinion as to whether or not County equipment, materials or supplies or property in the custody of or under control of the Commission or any member thereof may be used for any kind of work, job or project on the following property:

"(a) The Courthouse at Guntersville and the adjoining off street parking lots thereto which are used for parking of officials of the County and the general public? A public housing authority has been created for the purpose of remodeling, renovating and enlarging the Courthouse. Bonds have been issued for such purpose and the project is almost complete, such authority being created under the provisions of Chapter 15A of Title 12, of the 1958 Code.

Some parking lots need work done upon them and they need paving.

Until said authority was created, title to such property was in the County.

"(b) Public Schools in which title is in the Board of Education of Marshall County?

"(c) Public Schools in which title is in Local Trustees?

"(d) Public Schools in which title is in a Municipality?

"(e) Public Schools in which title might be in the State?

"(f) Church grounds?

“(g) Church cemeteries?

“(h) Private cemeteries?

“(i) Community Cemeteries?

“(j) Public roads where the County only has a right-of-way easement deed?

“(k) Public roads as to which the County has no deed, but it has been dedicated to the public by means of proper recording of subdivision plats?

“(l) Public roads as to which the County has no deed, but same have been used by the general public for years?

“(m) Any public road as to which the County does not own fee simple title thereto?

“(n) Public Park property where the County has a long-term lease from the TVA?

“(o) Public Park property where the County has a long-term lease from the TVA, but which is administered over by a public recreation board?

“(p) Public Park property which is owned by the County, but which is administered over by a public recreation board?

“(q) Little Mountain State Park property, which we understand, belongs to the State of Alabama?

“(r) May our Commission purchase furniture and office equipment to be used by public officials in the Courthouse at Guntersville?

“(s) A School owned by a church?

“Much rural area within this County lies within the City limits of municipalities which have a population of more than 750 persons. Many farm-to-market roads lie within the city limits of such municipalities, and more need to be constructed therein. In view of Section 10 of said Act may the following work be done by the Commissioners or any member thereof without a contract as specified by said Section 10:

“(1) Maintenance, resurfacing, grading of ditches or cutting of weeds along right-of-way of such farm to market roads?

“(2) The construction of new farm-to-market roads within the rural

area, but a part of which is within the city limits of such municipalities?

“(3) Grading, cherting or maintenance of dirt or chert roads that have been heretofore maintained by the County within the rural area, but are now within the city limits of such municipalities?”

Act No. 294, approved August 27, 1963, relates to the governing body of Marshall County, Alabama. Insofar as your inquiries are concerned, the pertinent sections thereof are 8, 9, and 10, which provide as follows:

“Section 8. Farm-to-market roads within the county shall be constructed and maintained by the commission. The commission may employ, and when necessary terminate the employment of, an engineer and such assistants as are necessary properly to construct, repair, and maintain the farm-to-market roads. Other county roads and bridges shall be constructed, repaired, and maintained by the commission on a district basis. Each associate member of the commission shall serve as supervisor of roads within his district, and may employ, supervise, direct, and when necessary terminate the employment of, such assistants and labor as are necessary properly to construct, repair, and maintain such other county roads and bridges within his district.

“Section 9. It shall be the duty of each associate member of the commission from the four districts of the county, in each December, to file for record with the commission a sworn statement and inventory of all equipment, machinery, and property of the county in his custody or under his control. The use of any county equipment, materials, or supplies or property of any nature in the custody of or under control of the commission or any member thereof, for any kind of work, job, or **project on property not owned by the county (excepting church grounds or cemeteries)** or on property outside the county, or the authorization of such work by the commission or by any member of the commission, shall result in forfeiture of office and removal by impeachment of such member or members and in addition thereto such member or members shall forfeit the penal sum of \$5,000 to be covered by suit brought by any qualified elector of the county, one-half for use of such elector and one-half for use of the county. (Emphasis supplied)

“Section 10. No work shall be authorized or performed by the commission or any member of the commission for any municipality of the county having population of more than 750 persons requiring the use of county equipment, materials, supplies or labor, unless such work is first authorized pursuant to a written contract between the municipality and the commission under which the municipality

agrees to pay the full cost of labor, materials, and supplies so used in such work.

"Chert, dirt or gravel taken from county-owned property or leased property may be loaded by county equipment and sold to municipalities and licensed contractors, and charges for the material shall be made at current market rates in addition to current market rates for the loading. Detailed and accurate records of such work and such sales shall be kept by the commission and together with all other records of the commission, shall be made immediately available to any qualified elector of the county."

In my opinion, the proviso in Section 9". . . project on property not owned by the county (excepting church grounds or cemeteries) . . ." does not embrace that property which is under the control and supervision of the county governing body, nor that property to which the county has fee simple title. It should be noted that church grounds or cemeteries are specifically excepted therefrom.

In consideration of the question presented in (a), the property interest of the county may also be determined, for the purpose of this opinion, by application of Title 12, Section 199(18), Code of Alabama Recompiled 1958, wherein a reversionary interest becomes vested at a definite time.

On the basis of the other recited premise, it follows that your inquiries (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), and (p) should be answered in the affirmative.

It should be noted that although certain items contained in your questions may come within the category of "projects on property not owned by the county," yet the expenditures of county funds, or its equivalent in labor and materials may otherwise be authorized.

Title 52, Section 207, Code of Alabama Recompiled 1958, authorizes the appropriation of county funds in support of public schools within the county. Of course this authorization has to be made by the county governing body and not by the individual members thereof, and the appropriation is made to the city or county board of education of the county.

Although your questions (b), (c), (d), and (e) would be answerable in the negative as your inquiry is worded, yet, there is authorization for the expenditure of county funds for public school purposes.

Your inquiry (s) is answerable in the negative. The expenditure by the county, either in labor or materials, would be unauthorized, as a church school is not a public school.

In regard to your question (q), counties are authorized to appropriate funds for state parks under Title 8, Section 182, which appropriation should be made by the county governing body and not by an individual member thereof. However, this question, as worded, would be answerable in the negative.

As above stated, it is noted that church grounds and cemeteries are excepted from Section 9, *supra*. However, the use of county funds, or the equivalent thereof in labor and materials for private (as distinguished from wholly public) purposes would be unauthorized.

Your questions (f), (g), (h), and (i), as worded, are answerable in the affirmative, but expenditures for such purposes may otherwise be unauthorized.

Your question (r), which is unrelated to the specific act under consideration, is generally answerable in the affirmative. Furniture and office equipment for the public officials in the courthouse may be purchased with county funds.

Averting to questions (1), (2), and (3), it is my opinion that the answers to the same are governed by Section 8, *supra*, rather than Section 10, *supra*. The specific provisions relative to "farm to market roads" govern over the general provisions as to use of county equipment and materials for road work within municipalities. In other words, Section 8 applies to all "farm to market roads" within or without municipalities. As to those parts of "farm to market roads" within a municipality, the municipality should cooperate in regard to the work performed thereon by the county.

From the foregoing, it follows that your inquiries (1), (2), and (3), as worded, are answerable in the affirmative.

The answers to your inquiries are general in nature, which may or may not be applicable to any specific set of facts that may arise.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 18, 1963

Honorable O. B. McCullough
Mayor, City of Tarrant City
Tarrant City, Alabama

Elections — Government — Municipalities — Officers and
Offices.

1. In municipalities having a population of less than 12,000 inhabitants, the legislative functions are exercised by the mayor and five aldermen.

2. In such municipalities all five aldermen must be elected at large unless the governing body determines that all five shall be elected from wards.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of November 6, 1963, is as follows:

"The City of Tarrant City is now operating with a Mayor-Council form of government, consisting of a Mayor, President of the Council and six councilmen—the City being divided into three wards with the Mayor and President of the Council being elected at large and two councilmen elected from each of three wards.

"Our City Attorney, Mr. James M. Tingle, has advised me that during the last session of the Legislature in the Patterson administration, a law was enacted changing the form of government for city's with a population of from 6000 to 12,000 so that when the new administration takes office October 1, 1964, we will operate with a Mayor and five councilmen, with the Mayor acting as the Presiding officer of the Council.

"I have been informed that the present City Council is charged with the duty of selecting the manner in which the City Officials will be elected in the General Election to be held in 1964. We are therefore anxious to know just how we will be allowed to set up this form of government.

"We are interested in one of the following methods:

"1. For all five councilmen elected at large.

"2. Divide the city into five wards with one councilman to be elected from each ward.

3. Retain the present three wards that we now have with one councilman to be elected from each ward and two councilmen to be elected at large, setting out place No. 1 and place No. 2 for the two councilmen that are to be elected at large.

"The City officials are inclined to use method No. 3, if it is determined by you it is legal."

Title 37, Section 404, Code of Alabama 1940, as amended by Section 1 of Act No. 666, Acts of Alabama 1961, page 910, provides that, in all municipalities having a population of less than 12,000 inhabitants, the legislature functions shall be exercised by the mayor and five aldermen. Said statute reads in part as follows:

"... The aldermen in such municipality shall be elected by the city or town at large, at the first general election held on the second Tuesday in August, 1964, and quadrennially thereafter or from wards as the said councils may determine, not less than six months before an election, . . ."

Section 404, as amended, *supra*, authorizes the governing body of the City of Tarrant City to determine whether the aldermen of said City will be elected at large or from wards. Cf. Biennial Report of Attorney General 1918-20, page 31. Said governing body is not authorized to determine that some aldermen will be elected at large and others will be elected from wards.

Therefore, you are advised that the governing body of the City of Tarrant City may adopt either the first or the second method, listed in your request, for electing the aldermen of said City. The third method may not be adopted.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

December 19, 1963

Honorable A. W. Todd, Commissioner
Department of Agriculture & Industries
State Office Building
Montgomery, Alabama

Purchasing Agent—

Authority and duty discussed.
Requisitioning agency, not Purchasing Agent, has sole discretion as to need of items requested.

Opinion by the Attorney General.

Dear Mr. Todd:

Your request for official opinion dated November 18, 1963 has been received, as follows:

"Your attention is invited to Title 55, Chapter 4, Article 4, 1940 Code of Alabama as amended and also to the provisions of Act Number 343 approved August 20, 1957.

"This office would like your official opinion as to whether or not the Division of Purchases and Stores or the Purchasing Agent is vested with the power and privilege of deciding whether this Department or any other Department has the right to purchase equipment, supplies, materials, et cetera, in its operation.

"This office has from time to time by requisition, properly executed, requested the purchase of needed equipment. Funds have been appropriated and are available to pay for same. Our requisitions have not been processed; Purchase Orders are not issued; and we have not received the items requested. We are confronted with this problem and respectfully request that you give us your official interpretation of the statutes cited and whether or not this Department is authorized to purchase through the Division of Purchases and Stores which is authorized to execute the purchase in the most favorable manner to the State. It appears to us that unless the purchase is patently illegal on its face that the discretion lies in the Department making the request and not in the Division of Purchases and Stores."

Title 55, Chapter 4, Article 4, Code of Alabama Recompiled 1958, Sections 108-144(2) contain the duties, authority and responsibilities of the Division of Purchases and Stores. Act No. 343, approved August 20, 1957, as amended by Act No. 870, approved September 8, 1961, provides further for competitive bidding on purchases and contracts. This act is cumulative.

Nowhere in these statutes is the Division of Purchases and Stores, or the Purchasing Agent, vested with any discretion as to whether or not the item requisitioned, or sought to be acquired by the requisitioning agency, is needed in the conduct of the affairs of that department, institution, or agency; provided, the form prescribed by the Department of Finance, sworn to as is required in Section 109 of said Title 55, is properly executed and presented to the Division of Purchases and Stores by the head of the requisitioning agency, or his duly authorized agent, and the funds are available therefor.

The prime and only function of the Division of Purchases and Stores in regard to the question here considered is to acquire those items or services sought in the most advantageous manner for the State, that is,

best quality, lowest price, and convenient delivery. An appropriation by the Legislature to the department for items of expense or equipment purchase, together with the statutory authority of the department to carry out the duties and obligations for which such department was established, vests the authority in the person responsible for the operation of the department to requisition the needed materials and services for its operation. He is charged with the duties and responsibilities of spending, when deemed necessary, the funds appropriated after allotment has been made, and he will have to answer to the electorate, if he be an elected official, or to the appointing authority, if he occupies an appointive position, for any mis-spending, waste or malfeasance.

The provisions of Title 55, *supra*, and said Act No. 343, as amended, set out the method of acquiring by purchase or otherwise the items and/or services requisitioned, and provide the protection deemed necessary by the Legislature in making purchases when properly requisitioned by a department asserting the need; and when a department head, by sworn statement, certifies the need and the budget officer states that the funds are allotted and available, the Division of Purchases and Stores has only to make the purchase or acquisition in the best interest of the State as is provided by the statutes.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 27, 1963

Hon. Homer McLemore, Chairman
Board of Revenue
Limestone County
Athens, Alabama

Elections — Returning Officer — Mileage.

1. The returning officer is entitled to only one round trip for handling ballots and other election material.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 11, 1963, is as follows:

"A question has arisen as to the payment of mileage of returning

officers in holding elections (Title 17, Section 198).

"Would you please advise us if it would be legal to pay returning officers 5c per mile for two round trips, that is, coming in to Court House and return to voting place and returning ballot box to Court House and return home.

"We shall appreciate your reply at your earliest convenience."

My answer to your inquiry is in the negative.

Title 17, Section 198, Code of Alabama 1940, Recompiled 1958, to which you refer in your request, provides as follows:

"§ 198. Pay of election officers.—The returning officer and the inspectors and clerks shall each be entitled to five dollars, and the returning officer, in addition, to five cents a mile in going to the courthouse and returning to the place of holding the election; the several claims shall be paid as preferred claims, out of moneys in the county treasury not otherwise appropriated, on proper proof of service rendered."

The language used in the above-quoted section is plain, clear and unambiguous and admits of no construction. The wording in the statutes itself answers your question in the negative, wherein it is provided that the returning officer shall be entitled to five cents a mile in going to the courthouse and returning to the place of holding the election.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

December 31, 1963

Honorable Harry D'Olive
Chief Clerk, Judge of Probate Office
Bay Minette, Alabama

Licenses — Contractors.

1. Whether a person who accept orders or contracts would be liable for the license tax under Title 51, Section 496, Code of Alabama 1940, Recompiled 1958, would depend upon whether the contract calls for such person to perform any of the work or do any of the things specifically mentioned therein.

2. Where one falls within the scope of Section 496, *supra*, and the provisions under which the license is levied, the fact that the total amount of remuneration to be paid to the contractor under the terms of the contract cannot be definitely ascertained at the time that the license becomes due, would not defeat the levy thereof or relieve the contractor from the liability of paying the amount of the license tax due.

3. There is nothing in Title 51, Section 496, *supra*, or the general provisions relating to privilege licenses contained in the same Code Title which would prevent the contractor under the circumstances as enumerated in the above headnote "2," and for the purpose of measuring the tax from estimating the "gross" amount of the remuneration to be paid under the contract.

4. The license for a so-called cost-plus contractor is to be based under Section 496, *supra*, on the "gross" or the total amount of the contract, and not just on the amount in excess of the cost.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of December 4, 1963, is as follows:

"Please let me have your opinion as to whether or not a privilege license is required for performing work on an hourly basis, and giving no guarantee figure as to the cost.

"Also would like to have your opinion as to whether or not a man hauling dirt at so much per load would be required to pay a contractor's license."

It is also my understanding from information which you furnished over the telephone that in addition to your request concerning the contractors who are said to be compensated on an hourly basis, with no definite figure stated, you also wish an opinion concerning those persons doing construction work under so-called cost-plus contracts, where the total amount which will be paid to the contractor under the contract, and which is to be used as the base in measuring and computing the tax, is not known at the time the license is due to be paid, and thus the exact amount of license tax to be paid cannot at such time be determined.

In the first place, it is necessary before attempting to answer your questions to examine the statute which levies the license on "Construc-

tion Companies or Contractors," namely, Title 51, Section 496, Code of Alabama 1940, Recompiled 1958. In material part the statute levies a license on:

"Any person, firm, or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring, or other steel, or any other building material, or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, **or who shall accept an order for contract to excavate earth, rock or other material for foundations or any other purpose**, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, or shall accept a contract to construct highways, bridges, dams, or railroads, shall be deemed a contractor . . ." (Emphasis supplied.)

The license is to be measured and computed as follows:

"If the **gross** amount of all orders or contracts accepted aggregate five thousand dollars and not exceeding ten thousand dollars, he shall pay the sum of ten dollars; if the amount of such orders or contracts is more than ten thousand dollars and does not exceed twenty thousand dollars, fifteen dollars; if the amount of such order or contracts exceed twenty thousand dollars and does not exceed fifty thousand dollars, twenty-five dollars; if the amount of such orders or contracts exceeds fifty thousand dollars and does not exceed one hundred thousand dollars, fifty dollars; if the amount of such orders or contracts exceeds one hundred thousand dollars and does not exceed one hundred and fifty thousand dollars, one hundred and fifty dollars; if the amount of such orders or contracts exceeds one hundred and fifty thousand dollars and does not exceed two hundred thousand dollars, two hundred dollars; if the amount of such orders or contracts exceeds two hundred thousand dollars, two hundred and fifty dollars . . ."

The levy of the license is one thing and the measure or way the license is to be computed (where due to be paid) is another. In other words, the fact that there may be some difficulty encountered in measuring the license would not defeat the levy or relieve one from having to procure the license. In this respect, I have been informed by officials of the State Department of Revenue, that it has been customary for years in such cases, and where the amounts used to measure and compute this license as well as other licenses based on gross receipts, amount of business done, etc., cannot be definitely ascertained at the time the license falls due, for the license to be required to estimate such amounts for the purpose of timely purchasing the license.

Under the circumstances, and if the amount estimated and declared by the licensee is found later during the year to be insufficient, then the licensee is required to pay the difference. On the other hand, and if the estimate is too high, then a refund to the licensee of the amount of the tax paid in excess of the amount actually due is in order. This long established procedure in such cases on the part of the Revenue Department also appears to be in keeping with the provisions of the statute, and particularly what is stated in the last part thereof.

If the contractor overestimates or overpays the tax then he would, of course, be entitled to a refund of any excessive amount paid, upon making proper application and proof thereof to the State Department of Revenue under the provisions of Title 51, Sections 848 and 849, Code of Alabama 1940, Recompiled 1958.

Before answering your specific questions, it is also well to note that in order for one to be liable for the contractor's license it is necessary that he fall clearly within the provisions of the statute, and be engaged in the activities and perform at least one of the acts described therein for which the license is imposed.

1. In regard to your questions concerning the cases of persons contracting to do work on an hourly basis, and where the total amount to be paid under the contract cannot be definitely determined at the time the license falls due, and persons who enter into so-called cost-plus contracts where the total amount to be paid to the contractor under terms of the contract during the license year is not definitely known when the license is due to be paid, and where they fall within the provisions of Title 51, Section 496, *supra*, and the levy of the license, then they would be liable for the payment of the license, and would be required to estimate the "gross" or total amount of the contract or contracts, and to purchase a license measured and based thereon.

Section 496 requires and provides for increases in the amount of the license where at any time during the license year the license initially procured is insufficient to cover all amounts paid under the contract which were not taken under consideration and are in excess of the amount initially estimated.

Evidently there is also some doubt in your mind in the case of the so-called cost-plus contract as to whether the total amount of the contract or contracts should be used in measuring the license, or whether only the amount in excess of cost should be used. Section 496, in this respect expressly requires that the "gross" or total amount of the contract or contracts be used as such measure, and not just the amount or amounts in excess of the cost.

2. In the case of the dirt haulers, you have not given me sufficient information to give you a specific answer. Whether such haulers would

be liable for the license would depend on whether their contracts call for them in addition to hauling, "to excavate earth, rock or other material for foundations or any other provisions, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, or shall accept a contract to construct highways, bridges, dams or railroads," or carry on any of the other activities described in Section 496.

If these people merely contract to haul the dirt in their trucks without also doing the digging or excavating of the dirt, or some of the other things described by the statute, then they would not be liable for the license under Section 496, supra, for only contracting to do the hauling. The answer to your question relating to the dirt haulers then depends upon the actual facts and whether the contractor in addition to hauling is excavating the dirt or doing some of the other acts specifically in the statute.

Your questions are answered accordingly.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

December 31, 1963

Honorable C. J. Sullivan
Sheriff
Washington County
Chatom, Alabama

Washington County — Sheriffs — Inferior Courts — Costs
and Fees.

1. Sheriff to receive usual fees, except attendance fees, for services rendered for court of general sessions for Washington County.
2. Sheriff's statutory obligations to court of general sessions for Washington County do not include court attendance for purpose of acting as bailiff.

Opinion by Assistant Attorney General Bridges.
Dear Mr. Sullivan:

Your request for an official opinion dated December 24, 1963 is as follows:

"As Sheriff of Washington County, Alabama I respectfully request your opinion and advice as to whether or not I am entitled to certain fees from the newly created Court of General Sessions (Section 7).

"The Court of General Sessions which officially begins its functions on January 6, 1964 and it is by necessity to know of my official position relative to the above act as soon as possible. I shall be sincerely grateful to you and to your honorable office to share this opinion with me as hurriedly as possible."

Act No. 137 of the 1963 Regular Session of the Legislature created a court of general sessions for Washington County. The provisions of said Act which are pertinent to your inquiry are as follows:

"Section 6. The judge of the court of general sessions may also appoint a bailiff. The compensation of the bailiff shall be \$7.50 a day for each day's attendance upon the court, and shall be paid from the general funds of the county on certificates signed by the judge.

"Section 7. The sheriff of Washington County in person or by deputy shall serve and execute the processes of the court of general sessions and shall be entitled to the fees prescribed by general laws for sheriffs performing like services in the county courts or the circuit courts.

"Section 8. Court costs shall be taxed and collected in criminal cases in the court of general sessions in the same way that costs are taxed and collected in the county courts under the general law, and in civil cases the costs shall be the same as in the circuit court. However, all court costs collected, except the fees, commissions, or allowances of the sheriff, and the fees of witnesses, shall be paid into the general fund in the county treasury."

An examination of Sections 6 and 7 of Act No. 137, *supra*, leads to the conclusion that the Legislature intended for the sheriff of Washington County to serve and execute the processes of the court created by said Act and to do all things legally necessary in connection with such duties; however, the statute does not obligate the sheriff to attend said court for the purposes of performing, in person or by deputy, the functions of a bailiff.

It is my opinion that the sheriff of Washington County is authorized by Act No. 137, *supra*, to receive for his services in criminal cases in the court of general sessions for Washington County the same costs and fees, except attendance fees, which are provided by the general law for such services in the county courts of this State. For his services in said court in civil cases the said Act permits the sheriff to receive the same costs and fees, except attendance fees, provided for sheriffs in circuit court civil cases. Act No. 137, Sections 7 and 8, *supra*; Title 11,

Sections 34 and 100, et seq., Code of Alabama 1940, Recompiled 1958.

Although it may be necessary for the sheriff of Washington County, in person or by deputy, to attend the court referred to in this opinion in the performance of his other duties related thereto, he is not authorized by Act No. 137, supra, to perform any of the duties of the bailiff and said Act does not provide for a fee for such attendance: "The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law." Title 11, Section 1, Code of Alabama 1940, Recompiled 1958. See also Title 11, Section 79, Code of Alabama 1940, Recompiled 1958, and Quarterly Report of Attorney General, Volume 34, page 38.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

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